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CIVIL CODE  
OF  
STATE OF IDAHO,  
1901.

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# COMMISSIONERS' CERTIFICATE.

UNITED STATES OF AMERICA,  
STATE OF IDAHO.

We, the undersigned, constituting the Code Commission for the State of Idaho, do hereby certify that the laws contained in these volumes, known, respectively, as The Political Code, The Civil Code, The Code of Civil Procedure and The Penal Code of the State of Idaho, have been by us compared with and the same do constitute and include the present existing laws of the State of Idaho, except special and local laws.

*Frank Martin.*

*Attorney General,  
Ex-Officio Member and Chairman.*

*H. M. Ruick*

*Alfred A. Fraser*

*Members Code Commission for the State of Idaho.*

Dated Boise, Idaho, this first day of November, 1901.

DEPOSITED BY  
STATE OF IDAHO

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# CIVIL CODE.

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## PRELIMINARY PROVISIONS.

**Section 1980. Title of Act and How Divided:** This act shall be known as the Civil Code of the State of Idaho, and whenever cited, enumerated, referred to or amended, may be designated simply as the Civil Code, adding, when necessary, the number of the section. It is divided into five titles, as follows:

Title X. Persons and Personal Relations.

Title XI. Corporations.

Title XII. Property and Property Rights.

Title XIII. Contracts and Obligations.

Title XIV. Relief.

1887 R. S. Sec. 2400; Titles added by Commission.

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## TITLE X.

### PERSONS AND PERSONAL RELATIONS.

Chap. LXXIV. Persons; Classification.

Chap. LXXV. Incapacity of Certain Persons.

Chap. LXXVI. Marriage.

Chap. LXXVII. Divorce.

Chap. LXXVIII. Husband and Wife.

Chap. LXXIX. Parent and Child.

### CHAPTER LXXIV.

#### PERSONS ; CLASSIFICATION.

Section.

1981. Minors.

Section.

1982. Unborn child.

**Section 1981. Minors:** Minors are:

1. Males under twenty-one years of age;
2. Females under eighteen years of age.

1887 R. S. Sec. 2405.

**FULL AGE IS COMPLETE, WHEN:** In computing the age of a person, the day of his birth is included. A person is therefore of the age of twenty-one years the day before the twenty-first anniversary of his birthday. On that day he may do any act which a man may do, and which an infant, that is, a person under the age of twenty-one years, cannot do, and as

the law takes no notice of the fractions of a day, he is of age the whole of the day before his twenty-first birthday. If a person is required to do any act within a definite time, after reaching his majority, the time is computed from the day before his twenty-first birthday, and the statute of limitation begins to run from that day.—Ross v. Morrow, 85 Tex. 172, 16 L. R. A. 542, 19 S. W. 1090; State v. Clark (Del.),

3 Harr. 557; *Hamilton v. Stevenson*, 4 Dana, 597; *Wells v. Wells*, 6 Ind. 447; *Bardswell v. Purrington*, 107 Mass. 419; *Phelan v. Douglas*, 11 How. Pr. 193;

*Blackstone's Commentaries* (Cooley), Vol. I, 463; *Kent's Commentaries*, Vol. 2, 233.

**Section 1982. Unborn Child:** A child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests, in the event of its subsequent birth.

1887 R. S. Sec. 2406.

**PERSONS IN EXISTENCE, WHO ARE:** An infant *en ventre sa mere*, was supposed at common law to be born for many purposes. It was capable of having a legacy, or a surrender of a copy-hold estate, made to it. It might have a guardian assigned to it; and it was enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with the common law.—*Blackstone's Commentaries* (Cooley), Vol. 1, 130.

It is now a rule established beyond a doubt, and recognized by text writers that a child *en ventre sa mere*, for purposes of inheritance or where its benefit is to be furthered, is regarded as *in esse*, and as capable of taking as though born at the time.—*Kent's Commentaries*, Vol. 4, 412, and note. For the purpose of taking an estate which is for its benefit, whether by descent, devise, or under statute of distributions, an infant is *in esse* from the time of conception, provided, that the infant be born alive, and after such a period that its continuance in life might reasonably be expected.—*Harper v. Archer*, 4 Smed. and M. 99, 43 Am. Dec. 472; *Marsellis v. Thalhimier*, 2 Paige, 35, 21 Am. Dec. 66. A child born within six months is presumed incapable of living.—*Id.*

For a full discussion of the question as to whether an unborn infant is regarded as *in esse*, see *Harper v. Archer*, *supra*, and the extensive note thereto.

A child *en ventre sa mere* is included in the term "children."—*Nelson v. G. H. & S. Ry. Co.* (Tex.), 11 L. R. A. 391, 14 S. W. 1021, and

cases cited. A partition of sale under judgment of partition will bar future contingent interest of persons not *en esse*.—*Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455. And where an estate is vested in persons living, subject only to the contingency that a person may be born who will have an interest therein, the living owners of the estate for the purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for persons unborn. The rights of persons unborn are sufficiently cared for if the estate shall be sold under regular and valid judgment, its proceeds take its place and are secured in the same way for such person.—*Kent v. Church of St. Michael* (N. Y.), 18 L. R. A. 331, 32 N. E. 704. Persons yet unborn are not deprived of their rights without due process of law by making them defendants in a bill to remove a cloud upon title, and having them represented by a guardian *ad litem*.—*Loring v. Hildreth* (Mass.), 40 L. R. A. 127, 49 N. E. 652. A posthumous child can maintain an action for injuries causing the death of its father, and the fact that an action has already been brought by other beneficiaries will not preclude a subsequent action by a child not born when the former action was brought, and whose rights were not considered in it. And the statute of limitations does not begin to run against the right of action of such child because of the fact that the mother of the child was capable of suing when the cause of action accrued.—*Nelson v. G. H. & S. Ry. Co.* (Tex.), 11 L. R. A. 391, 14 S. W. 1021.

## CHAPTER LXXV.

### INCAPACITY OF CERTAIN PERSONS.

#### Section.

1983. Disaffirmance of contract by minors.

1984. Minor's contract for necessities.

1985. Certain obligations binding.

1986. Persons without understanding.

#### Section.

1987. Contract of persons of unsound mind.

1988. Powers of persons adjudged of unsound mind.

### Section 1983. Disaffirmance of Contract by Minor:

In all cases other than those specified in the next two sections, the



contract of a minor, if made while he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor while he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent.

1887 R. S. Sec. 2407.

**DISAFFIRMING CONTRACTS:** The contracts of an infant, when not intrinsically illegal are voidable, and not void; and are binding unless disaffirmed by the minor himself.—*Kendrick v. Niesz* (Colo.), 30 Pac. 245. And such contract does not depend upon the ratification thereof by him after his minority ends but to invalidate such contract, he must, by some act clear and unmistakable in its character disaffirm the same. The bringing of a suit in equity to cancel a deed made when a minor, is a sufficient disaffirmance of such deed and such act of disaffirmance must be made within a reasonable time after he becomes of age.—*Englebert v. Pritchett* (Neb.), 26 L. R. A. 177, 58 N. W. 852. The deed of an infant must be disaffirmed by an act of solemnity.—2 Kent's Commentaries, 237.

If an infant grantor, after attaining his majority, executes a conveyance of lands embraced in a deed given by him when a minor, the second conveyance will work a disaffirmance of the first, unless before an execution of the second conveyance, the first has been ratified, and such ratification may be made after he arrives at majority, by an express verbal ratification, or by acts which reasonably imply an affirmance, or by an omission to disaffirm the deed within a reasonable time.—*Hastings v. Dollarhide et al.* 24 Cal. 195; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Mustard v. Wohlford's Heirs*, 15 Grattan 329; 76 Am. Dec. 209.

No one can take advantage of the fact of infancy in avoidance of contracts except the infant himself, or his heirs, or personal representatives.—*Hastings v. Dollarhide*, supra; *Craig v. Van Bebber*, supra; Where a minor, after majority, without fraud or undue influence, executes to his late guardian a receipt for the value of property obtained by him from the

guardian during minority, under voidable contract, this is a ratification.—*Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774. In *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233, it was held where a minor conveyed real estate to his father, the mere acquiescence for three years after majority is not a ratification; but in *Jones v. Jones*, 46 Iowa, 473, it was held that four months were deemed a reasonable time in which to disaffirm a contract entered into by a minor with his father. And Schouler on Dom. Rel. Sec. 439, in speaking on the subject of disaffirming conveyance of real estate says: "There seems to be no doubt upon the decided cases that mere acquiescence is no confirmation of sale of lands unless it has been prolonged for a statutory period of limitations; and that a conveyance may be made any time before the statute has barred an entry." What is a reasonable time for one, after becoming of age, to disaffirm a contract made by him during his minority, is a mixed question of law and fact, to be determined from the circumstances of each case.—*Englebert v. Pritchett* (Neb.), 26 L. R. A. 177, 58 N. W. 852; *Jenkins v. Jenkins*, 12 Iowa, 195.

The rule that an infant is bound by his contracts, unless he disaffirms them within a reasonable time after his majority, applies only to such contracts as are beneficial to the infant.—*Groesbeck v. Bell*, 1 Utah, 338.

Under our statute, if the contract is entered into after the minor is eighteen years of age, the consideration must be returned upon a disaffirmance of the contract; this plain provision settles the question in this state, upon which there is a great divergence of opinion among the courts. For an exhaustive discussion of infants' contracts, see notes to *Englebert v. Pritchett*, supra, and *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906. (Note by Code Commission.)

**Section 1984. Minor's Contract for Necessaries:** A minor cannot disaffirm a contract otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them,

1887 R. S. Sec. 2408.

**CONTRACT FOR NECESSARIES:**

It is a well established doctrine that contracts for necessities are binding upon an infant.—*Parsons v. Keys*, 43 Tex. 557; *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101. Upon such contracts the contract price cannot be recovered by the vendor, but only the reasonable value of the things furnished.—*Locke v. Smith*, 41 N. H. 346; *Price v. Sanders*, 6 Ind. 310, and the value is a question of fact.—*Locke v. Smith*, supra; *Kilgore v. Rich (Me.)*, 12 L. R. A. 859, 22 Atl. 176; *Askey v. Williams*, supra. The question of necessities is governed by the real circumstances of the infant and not by what its situation appears to be. An infant when at home under the care of its father and supported by him cannot be made liable for necessities.—*Angel v. McLellan*, 16 Mass. 31; *Kilgore v. Rich*, supra; *Rainwater v. Durham*, 2 Nott & McCord, 524, 10 Am. Dec. 637; *Kline v. L'Amoreux*, 2 Paige, 419, 22 Am. Dec. 652. Persons dealing with an

infant are bound to inquire and know whether his circumstances and situation are such that he can bind himself for necessities.—Id.

**NECESSARIES, WHAT ARE:** The meaning of the term necessities cannot be defined by a general rule applicable to all cases, but must be determined by the facts and circumstances in each particular case.—*Englebert v. Pritchett (Neb.)*, 26 L. R. A. 177, 58 N. W. 852; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906.

Room necessary for lodging while attending college is a necessary for which an infant may contract.—*Gregory v. Lee (Conn.)*, 25 L. R. A. 618, 30 Atl. 53; so is the board bill of an infant while attending school, and the third person who pays for such necessities at the infant's request has a cause of action against him for the reasonable value of such necessities.—*Kilgore v. Rich*, supra. In *Rainwater v. Durham*, supra, it was held that a horse does not properly come under the designation of necessities.

**Section 1985. Certain Obligations Binding:** A minor cannot disaffirm an obligation otherwise valid, entered into by him under the express authority or direction of a statute.

1887 R. S. Sec. 2409.

**Section 1986. Persons Without Understanding:** A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

1887 R. S. Sec. 2410.

The rule that the promissory note of a person non compos mentis, is invalid is subject to the qualification that when it is given for necessities or other adequate consideration of benefit furnished the maker in good faith, without knowledge of his unsound mental condition, it may be enforced to the extent of the value of the consid-

eration furnished.—*Hosler v. Beard (Ohio)*, 35 L. R. A. 161, 43 N. E. 1040.

A sale of personal property, made by a person not having the mental capacity to contract, does not transfer the title and is void, both as against the vendee and subsequent purchasers from him.—*Harris v. Harris*, 64 Cal. 108, 28 Pac. 63.

**Section 1987. Contract of Person of Unsound Mind:** A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined is subject to rescission.

1887 R. S. Sec. 2411.

The contract of an insane person is voidable, not void. The right to avoid it is a personal right, which can only be exercised by the insane person, his guardian or representatives. And in an action against the surety of a note, the insanity of the maker constitutes no

defense, for a surety or indorser of a promissory note is deemed in law to contract that the principal maker of a note is in every way capable to contract in the manner he has contracted and that the instrument is a binding contract upon the maker.—*Caldwell v. Ruddy*, 2 Idaho 5, 1 Pac. 339.

**Section 1988. Powers of Persons Adjudged of Unsound Mind;** After his incapacity has been judicially determined,



a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person has been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.

1887 R. S. Sec. 2412.

A sale of personal property made by one not having the mental capacity to contract, does not transfer the title and

is void both as against the vendee and subsequent purchaser from him.—*Harris v. Harris*, 64 Cal. 108, 28 Pac. 63.

## CHAPTER LXXVI.

### MARRIAGE.

#### Section.

- 189. What constitutes marriage.
- 190. Age of persons contracting marriage.
- 191. Marriage, how manifested and proved.
- 192. Marriage, when voidable.
- 193. Incestuous marriages.
- 194. Certain marriages illegal.
- 195. Second marriages, when illegal and void.
- 196. Released from contract for unchastity.
- 197. Foreign marriages valid.
- 198. Marriages, how solemnized.
- 199. Marriage license, form of.
- 200. Certificate of marriage, form of.

#### Section.

- 201. When recorder to issue license.
- 202. Recorder may administer oaths.
- 203. Who may solemnize marriage.
- 204. Record of licenses, penalty for neglect.
- 205. Fees of recorders.
- 206. Books of marriage as evidence.
- 207. Duty of person solemnizing marriage.
- 208. Persons authorized to solemnize marriage.
- 209. Manner of solemnizing marriage.
- 210. Proof of qualifications.
- 211. Parties entitled to certificate.
- 212. Fee for solemnizing marriage.
- 213. Validity of marriage.

**Section 189. What Constitutes a Marriage:** Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties or obligations.

1887 R. S. Sec. 2420; 1877, 9th Ses. p. 24.

A marriage to be sufficient upon which to base a charge of bigamy, need not be a regular solemnization and authenticated marriage, but it is sufficient if there is a consent to the marriage followed by a mutual assumption of marital rights, duties, and obligations.—*People v. Beevers*, 99 Cal. 286, 33 Pac. 844; *People v. Lehmann*, 104 Cal. 634, 38 Pac. 422.

A mutual agreement of the parties to live together in the professed relation of husband and wife is essential to create a contract of marriage, and the contract when made imposes upon the parties to it, the obligation to do so.—*Kilburn v. Kilburn*, 89 Cal. 46, 26 Pac. 636. See *Hinckley v. Ayres*, 105 Cal. 357, 38 Pac. 735.

Consent alone will not constitute marriage, it must be followed by a solemnization or by a mutual assumption

of marital rights, duties, or obligations. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345.

Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.—*Letters v. Cady*, 10 Cal. 533; cited 70 Cal. 564, 11 Pac. 653.

Marriage is a civil contract as well as a religious vow which, while it is invalidated by want of consent, is, if valid obligatory upon the parties during their joint lives, and cannot be cast off at pleasure.—*Fornshill v. Murray* (Md.), 18 Am. Dec. 344. Marriage is a civil contract and may be avoided, like other contracts, for want of sufficient mental capacity in the parties. If at the time of attempting to contract, the mind is unsound, it is incapable of that consent which is necessary to the validity of the contract. Mental unsoundness to avoid a marriage contract must be clearly shown, and must be sufficient in degree, as it is not every unsound-

ness that will avoid the contract. The general test, is the fitness of the person to be trusted with the management

of himself and his own concerns.—*Cole v. Cole* (Tenn.), 70 Am. Dec. 275.

### **Section 1990. Age of Persons Contracting Marriage:**

Any unmarried male of the age of eighteen years or upwards, and Any unmarried female of the age of eighteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

1887 R. S. Sec. 2421, amended 1889, 15th Ses. p. 40.

### **Section 1991. Marriage, How Manifested and Proved:**

Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

1887 R. S. Sec. 2422.

**PROOF OF MARRIAGE ADMISSIBILITY IN GENERAL:** Assumption by the parties to the contract for present marriage, subsequent to the contract, of the rights and duties of the marital relations, with the intention of executing the contract, constitutes the necessary present consent.—*In re Ruffino's estate*, 116 Cal. 304, 48 Pac. 127. A contract of present marriage, followed at any time by the parties assuming the rights and duties of the marital relations, both understanding and intending thereby to consummate the marriage contract, make a valid marriage.—*In re Ruffino's estate*, *supra*.

Except in cases of seduction, marriage may be proved in civil cases by reputation, declaration, and conduct of the parties.—*Clayton v. Clayton*, 4 Colo. 410. On trial for seduction under promise of marriage, evidence that prior to the day which was set for the marriage, and while no marriage previous to said day was contemplated,

defendant, without objection from plaintiff, introduced her as his wife, and occupied the same room with her at a hotel, where the alleged offense was committed, does not show the "mutual assumption of marriage rights, duties or obligations," which, in addition to consent, is necessary to constitute a valid marriage.—*People v. Lehmann*, 104 Cal. 631, 38 Pac. 422.

In an action against a railway company for injuries causing death, declarations of decedent, contained in a letter shown to have been written by him, are competent to prove his marriage.—*Kans. Pac. Ry. Co. v. Miller*, 2 Colo. 442.

A common law marriage is not shown by irregular cohabitation and partial reputation.—*Taylor v. Taylor* (Colo. App.), 50 Pac. 1049. Nor is a common law marriage established by the proof of cohabitation alone where the parties do not hold each other out as husband and wife.—*Stans v. Baitey*, 9 Wash. 115, 37 Pac. 316.

**Section 1992. Marriage, When Voidable:** If either party to a marriage, be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable.

1887 R. S. Sec. 2423; 1877, 9th Ses. p. 25.

Where marriage is between persons, one of whom has no capacity to contract marriage at all, the marriage is void absolutely, and may be inquired of in any court. Under such a marriage, no civil rights can be acquired.—*Gathings v. Williams* (N. C.), 44 Am. Dec. 49.

A marriage procured by duress is

voidable.—*Willard v. Willard* (Tenn.), 32 Am. Rep. 529. A marriage procured by fraud is voidable at the suit of the injured party, independent of any provisions of the divorce law.—*Henneger v. Lomas* (Ind.), 32 L. R. A. 848, 44 N. E. 462. But a court of equity has no inherent jurisdiction to annul a marriage in the absence of fraud or duress.—*Ridgely v. Ridgely*, 79 Md. 298, 25 L. R. A. 800, 29 Atl. 597.

**Section 1993. Incestuous Marriages:** Marriages between parents and children, ancestors and descendants of every degree, and between brother and sisters of the half as well as the whole blood, and between uncles and nieces, or aunts and nephews are incestuous,



and void from the beginning, whether the relationship is legitimate or illegitimate.

1887 R. S. Sec. 2424; 1877, 9th Ses. p. 25.

**PENALTY FOR VIOLATION OF SECTION:** Penal Code, Sec. 4701. A husband is not related by affinity to his wife's brother's wife, so as to make

sexual intercourse between them incestuous.—*Chinn v. State* (Ohio), 11 L. R. A. 630, 26 N. E. 986.

See *People v. Barnes*, 2 Idaho, 148, 9 Pac. 532.

**Section 1994. Certain Marriages Illegal:** All marriages of white persons with negroes or mulattoes are illegal and void.

1887 R. S. Sec. 2425.

**Section 1995. Second Marriage, When Illegal and Void:** A subsequent marriage contracted by any person during the life of the former husband and wife of such person, with any person other than such former husband and wife, is illegal and void from the beginning unless:

1. The former marriage has been annulled or dissolved;
2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

1887 R. S. Sec. 2426; 1877, 9th Ses. p. 25.

**PRESUMPTION OF DEATH:** In most of the states, statutes provide that where a party has been absent, unheard of or beyond seas for five or seven years, the other party shall not be punishable for marrying again.—See *Barber v. State*, 50 Md. 161; *Eubanks v. Banks*, 34 Ga. 407. But such statutes do not apply to cases where the party marries a second time knowing the absent party is living.—*Com. v. Johnson*, 10 Allen (Mass.), 196; 1 Bish. M. and D. Sec. 596. Nor do they render the second marriage valid if the first really existed still.—*Glass v. Glass*, 114 Mass. 563. A marriage between parties, one of whom has a husband or wife living, is absolutely void, and no rights of the other party are affected thereby. This

is not altered by the fact that the statute provides for actions to annul such marriages.—*Drummond v. Irish*, 52 Iowa, 41, 2 N. W. 622.

A wife who was married to and living with her husband in Australia, afterwards left him, and went to live with her parents who also resided in Australia. The husband then removed to California where he married again eight years afterwards. Held, that the first wife was "absent" from her husband within the statute which provides that the second marriage during the life of the former spouse is valid until legally annulled where the former spouse is absent and not "known to such person to be living for the space of five successive years immediately preceding such subsequent marriage." *Jackson v. Jackson* (Cal.), 29 Pac. 957.

**Section 1996. Release from Contract for Unchastity:** Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein.

1887 R. S. Sec. 2427.

**Section 1997. Foreign Marriages Valid:** All marriages contracted without this state which would be valid by the laws of the country in which the same were contracted, are valid in this state.

1887 R. S. Sec. 2428; 1877, 9th Ses. p. 25.

**VALIDITY OF MARRIAGE:** The validity of marriage has to be tested by

the law of the place where it is celebrated. If valid there, it is valid everywhere. A marriage contract without the state, which is valid by the law of the place where contracted is valid in this state if the parties subsequently removed here, even though the marriage would have been invalid by the laws of this state if contracted here.—*Pierson v. Pierson*, 51 Cal. 120; *Medway v. Meedham* (Mass.), 18 Am. Dec. 131; *Fornhill v. Murray* (Md.), 18 Am. Dec. 344; *Harding v. Alden* (Me.), 23 Am. Dec. 549.

Marriages between white persons

**Section 1998. Marriages, How Solemnized:** Marriage must be solemnized, authenticated, and recorded as provided in this chapter, but non-compliance with its provisions does not invalidate any lawful marriage.

1887 R. S. Sec. 2429; 1877, 9th Ses. p. 25.

A marriage without a license is not invalid, though the parties participating in the ceremony may be criminally liable.—*Connors v. Connors* (Wyo.), 40 Pac. 966; proof of a marriage ceremony performed in a church by a minister authorized to perform such ceremony,

and negroes are unlawful, but when a white person and a negro leave the state, never intending to return and are married in a state where the law permits of such marriages and afterwards do return to the state, the marriage is not void.—*State v. Ross* (N. C.), 22 Am. Rep. 678.

But when the parties leave the state to be married for the purpose of evading the law, and are married in a state not prohibiting such marriages and return to this state, their marriage is void.—*State v. Kennedy* (N. C.), 22 Am. Rep. 683.

and that this was followed by a cohabitation of the parties, is sufficient proof of a legal marriage, without it being shown that a license was obtained and a certificate returned by the minister, as required by statute.—*State v. McGilvery* (Wash.), 55 Pac. 115; *People v. Schoomaker* (Mich.), 79 N. W. 439.

**Section 1999. Marriage License, Form of:** The county recorder of any county in this state shall have authority to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to contract matrimony, authorizing the marriage of such parties, which licenses shall be substantially in the following form:

Know all men by this certificate that any regularly ordained minister of the gospel, authorized by the rites and usages of the church or denomination of Christians, Hebrews, or religious body of which he may be a member, or any judge or justice of the peace or competent officer to whom this may come, he not knowing of any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between . . . . ., of . . . . . of the county of . . . . ., and . . . . ., of . . . . . of the county of . . . . ., and to certify the same to said parties or either of them, under his hand and seal, in his ministerial or official capacity, and thereupon he is required to return his certificate in form following, as heretofore annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, at . . . . ., this . . . . . day of . . . . . A. D. 19 . . .

Recorder

1899, 5th Ses. p. 278, Sec. 1.

**Section 2000. Certificate of Marriage, Form of:** The form of certificate annexed to said license, and therein referred to, shall be as follows:



I, ....., a ....., residing at ....., in the county of....., in the State of Idaho, do certify that, in accordance with the authority on me conferred by the above license, I did on this.....day of....., in the year A. D. 19.., at ....., in the county of..... in the State of Idaho, solemnize the rites of matrimony between....., of....., in the county of.....of the....., and....., of ....., of the county of....., of the ....., in the presence of ..... and .....

Witness my hand and seal at the county aforesaid, this .....day of....., A. D. 19...

In the presence of

.....

.....[SEAL]

The license and certificate, duly executed by the minister or officer who shall have solemnized the marriage authorized, shall be returned by him to the office of the recorder who issued the same, within thirty days from the date of solemnizing the marriage therein authorized.

1899, 5th Ses. p. 278, Sec. 2.

Penalty for wilfully making false re-

Penalty for neglect to make return: turn: Penal Code, Sec. 4631.  
Penal Code, Sec. 4722.

### **Section 2001. When Recorder to Issue License:**

Every county recorder who shall have personal knowledge of the competency of the parties for whose marriage a license is applied for shall issue such license upon payment or tender to him of his legal fee therefor; and, if such recorder does not know of his own knowledge that the parties are competent under the laws of this state to contract matrimony, he shall take the affidavit in writing of the person or persons applying for such license, and of other persons as he may see proper, and of any persons whose testimony may be offered; and if it appear from the affidavit so taken that the parties for whose marriage the liecnse in question is demanded, are legally competent to marry, the recorder shall issue such license, and the affidavits so taken shall be his warrant against any fine or forfeiture for issuing such license.

1899, 5th Ses. p. 279, Sec. 3.

Penalty for issuing license illegally:  
Penal Code, Sec. 4649.

**Section 2002. Recorder May Administer Oaths:** The county recorder shall have power to administer all oaths required or provided for in this Chapter.

1899, 5th Ses. p. 279, Sec. 4.

Penalty for false swearing Penal  
Code, Sec. 4648.

**Section 2003. Who May Solemnize Marriage:** Any authorized minister or officer to whom any such license, duly issued, may come, not having personal knowledge of the incompetency of either party therein named to contract matrimony, may lawfully solemnize matrimony between them.

1899, 5th Ses. p. 279, Sec. 5.

son.

See Sec. 2013 as to validity of marriage solemnized by unauthorized person.  
Penalty of solemnizing marriage without license: Penal Code, Sec. 4724.



**Section 2004. Record of Licenses. Penalty for Neglect:** The recorder shall record all such returns of marriage licenses in a book to be kept for that purpose, within one month after receiving the same. If any recorder shall neglect or refuse to record within the said time any return to him made, he shall forfeit one hundred dollars, to be recovered, with costs, by any person who will prosecute for the same.

1899, 5th Ses. p. 279, Sec. 7.

**Section 2005. Fees of Recorder:** The recorder of each county in this state shall be entitled to a fee of one dollar for each license issued, which fee he shall demand and receive from the person applying for the same, and he may refuse to issue any such license until such fee is paid to him. Said fee shall also include the payment for the service of recording the license upon its return by the minister or officer solemnizing the marriage for which it was issued.

1899, 5th Ses. p. 279, Sec. 8.

**Section 2006. Books of Marriage as Evidence:** The original certificate and the books of marriages and copies of entries therein, certified by the recorder under his official seal, shall be evidence in all courts.

1887 R. S. Sec. 2440 as amended, 1899, 5th Ses. p. 280, Sec. 9.

**Section 2007. Duty of Person Solemnizing Marriage:** All persons herein authorized to solemnize marriages must ascertain and be assured of:

First. The identity of the parties;

Second. Their real and full names and places of residence;

Third. That they are of sufficient age to be capable of contracting marriage;

Fourth. If under the age of eighteen, the consent of the father, mother, or guardian, if any such, is given, or that such non-aged person has been previously but is not at the time married; and that the parties applying for the rites of marriage, and making such contract, have a legal right so to do.

1887 R. S. Sec. 2430, amended 1889, 15th Ses. p. 40 by amendment of Sec. 2421, R. S.

**Section 2008. Persons Authorized to Solemnize Marriage:** Marriage may be solemnized by either a justice of the supreme court, district or probate judge, the governor, a justice of the peace, mayor, priest or minister of the gospel of any denomination.

1887 R. S. Sec. 2431; 1877, 9th Ses. p. 25.

**Section 2009. Manner of Solemnizing Marriage:** No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

1887 R. S. Sec. 2432; 1877, 9th Ses. p. 25.

**Section 2010. Proof of Qualifications:** The person solemnizing the marriage may administer oaths and examine the

parties and witnesses for the purposes of satisfying himself that the contracting parties are qualified under the requirements of this Chapter.

1887 R. S. Sec. 2433; 1877, 9th Ses. p. 26.

**Section 2011. Parties Entitled to Certificate:** When a marriage has been solemnized, the person solemnizing the same must give to each of the parties, if required, a certificate thereof.

1887 R. S. Sec. 2436; 1877, 9th Ses. p. 26.

**Section 2012. Fee For Solemnizing Marriage:** The person solemnizing a marriage is for such service entitled to receive from the parties married the sum of five dollars, but may receive any other greater sum voluntarily given by the parties to such marriage.

1887 R. S. Sec. 2438; 1877, 9th Ses. p. 26.

**Section 2013. Validity of Marriage:** No marriage solemnized by any person professing to be a judge, justice, or minister, is deemed or regarded void, nor is the validity thereof to be in any way affected on account of any want of jurisdiction or authority: *Provided*, It be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

1887 R. S. Sec. 2439; 1877, 9th Ses. p. 26.

Penalty for falsely presuming to join in marriage: Penal Code, Sec. 4726.

## CHAPTER LXXVII.

### DIVORCE.

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## NULLITY.

**Section 2014. Grounds for Annulment of Marriage:**

A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or persons having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabits with the other as husband and wife;

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;

3. That either party was of unsound mind, unless such party after coming to reason, freely cohabit with the other as husband or wife;

4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife;

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife;

6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable.

1887 R. S. Sec. 2450.

To authorize a sentence of nullity on the ground of impotency it is necessary for the complaint to establish the fact of the existence of the alleged incapacity at the time of marriage, and that such incapacity still continues and is incurable.—*Devenbagh v. Devenbagh* (N. Y.), 28 Am. Dec. 443.

Marriage will not be annulled for physical incapacity solely on the confessions and declarations of the parties.

Incapacity must exist at the time of the marriage and must continue, and be incurable to be ground for a decree of nullity.

The court may direct an examination by surgeons and matrons to ascertain incapacity, and must use the utmost vigilance to guard against fraud and collusion in such cases.—*Devenbagh v. Devenbagh*, *supra*.

False representations by a woman to a man with whom she had had illicit intercourse, and who knew her to be pregnant, that he was the only person with whom she had been incontinent, made to induce him to marry her, are not fraud for which the marriage will be annulled.

Where a man marries a woman whom he has debauched before marriage, and whom he knew to be preg-

nant with child at the time of marriage, the marriage will not be annulled on the ground that he was deceived by the false assurances of the wife before marriage that he was the father of the child, and that she had been chaste with all other men.—*Franke v. Franke* (Cal.), 18 L. R. A. 375, 31 Pac. 571.

False representations of pregnancy made by a woman to induce a man with whom she had had illicit intercourse to marry her, are not such fraud as will entitle him to a divorce in case he enters into the marriage contract—at least if they were not believed by him.

Threats to inflict bodily harm upon a person unless he marries another, will not entitle him to a divorce in case he does so, where it does not appear that he was coerced by the threats, but entered into the marriage contract from other motives.—*Todd v. Todd* (Pa.), 17 L. R. A. 320, 24 Atl. 128.

A marriage is absolutely void where one of the parties was insane at the time, and may be annulled by her heirs after her death where she was never in a condition to satisfy the same.—*Orchardson v. Cofield*, 171 Ill. 14, 40 L. R. A. 256, 49 N. E. 197.

Marriage of a lunatic or person non compos is void; a marriage contract

entered into with one in whom there are but rare instances of any reasoning powers, and where the evidence tends to show that such person has been induced to marry by another only for the purpose of securing his property, is null and void.—*Foster v. Means* (S. C.), 42 Am. Dec. 332.

A marriage with a person who has been found to be mentally imbecile, is absolutely void, and can, at any time, be so declared by the court.—*Sims v. Sims*, 121 N. C. 297, 40 L. R. A. 737, 28 S. E. 407.

A marriage invalid at the time for want of mental capacity of one of the parties thereto, may be ratified and be valid afterwards by any acts or conduct which amount to a recognition of the same.—*Prine v. Prine* (Florida), 34 L. R. A. 87, 18 So. 781.

See extensive note on this subject under principal case of *Sims v. Sims*, reported in 40 L. R. A. 737, 121 N. C. 297, 28 S. E. 407.

**Section 2015. Limitation of Time for Commencing Action:** An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows

1. For causes mentioned in subdivision one; by the party to the marriage who was married under the age of legal consent within four years after arriving at the age of consent or by a parent, guardian, or other persons having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent.

2. For causes mentioned in subdivision two; by either party during the life of the other, or by such former husband or wife.

3. For causes mentioned in subdivision three; by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party;

4. For causes mentioned in subdivision four by the party injured, within four years after the discovery of the facts constituting the fraud;

5. For causes mentioned in subdivision five; by the injured party, within four years after the marriage;

6. For causes mentioned in subdivision six; by the injured party, within four years after the marriage.

1887 R. S. Sec. 2451.

**Section 2016. Children Legitimate, When:** When a marriage is annulled on the ground that a former husband or wife is living, or on the ground of insanity, children begotten before the judgment are legitimate and succeed to the estate of both parents.

1887 R. S. Sec. 2452.

Children born or begotten during existence of a voidable marriage are considered legitimate, even though such

marriage is adjudged to be void by a court of competent jurisdiction.—*Henneger v. Lomas* (Ind.), 32 L. R. A. 848, 44 N. E. 462.

**Section 2017. Custody of Children:** The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

1887 R. S. Sec. 2453.

**Section 2018. Effect of Judgment of Nullity:** A



judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

1887 R. S. Sec. 2454.

#### DISSOLUTION.

**Section 2019. Marriage, How Dissolved:** Marriage is dissolved only:

1. By the death of one of the parties; or
2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

1887 R. S. Sec. 2455.

**MARRIAGE DISSOLUTION:** Husband and wife cannot dissolve the marriage contract, either wholly or partially, by any agreement between themselves. But voluntary separation

may be permitted, and even enforced, if necessary, to protect either party from personal violence or gross moral offense of the other.—*Helms v. Francis* (Md.), 20 Am. Dec. 402.

**Section 2020. Effect of Judgment:** The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons.

1887 R. S. Sec. 2456.

Courts will use their discretion to defeat any and all attempts to use the forms of the law of divorce to minister to the caprices of the fickle minded,

or to the revenges of the disappointed or vindictive, or to the passions of the incontinent.—*Dennis v. Dennis* (Conn.), 34 L. R. A. 449, 36 Atl. 34.

**Section 2021. Causes for Divorce:** Divorces may be granted for any of the following causes:

1. Adultery;
2. Extreme cruelty;
3. Willful desertion;
4. Willful neglect;
5. Habitual intemperance;
6. Conviction of felony;
7. Permanent insanity.

1887 R. S. Sec. 2457, last clause added by Commission in conformity with act

of 1899, 5th Ses. p. 232; 1895, 3d Ses. p. 11.

**Section 2022. Adultery Defined:** Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.

1887 R. S. Sec. 2458.

**ADULTERY:** The act of adultery, like any other fact, may be established by circumstantial proof. The fact that a married man enters a house of prostitution in the evening and remains all night, raises a strong presumption of adulterous intercourse, and casts the burden on the party who

does so of showing that he is innocent.—*Evans v. Evans*, 41 Cal. 103.

Where adultery is charged as grounds for a divorce, the time when, the place where, and the person with whom such offense was committed, must be stated.—*Stover v. Stover*, (Idaho), 56 Pac. 263.

**Section 2023. Extreme Cruelty Defined:** Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.

1887 R. S. Sec. 2459.

**EXTREME CRUELTY, WHAT IS:** Extreme cruelty, as a ground for di-

vorice, may consist of words only, and of personal treatment short of acts of violence causing mental suffering,—



*Rosenfeld v. Rosenfeld* (Colo.), 40 Pac. 49. What acts constitute extreme cruelty within the meaning of the statute, providing for divorce upon that ground, cannot be defined with precision; but each case is to be determined by its own peculiar circumstances, by the good sense and judgment of the court and jury, keeping always in view the intelligence, apparent refinement and delicacy of sentiment of the complaining party.—*Fleming v. Fleming*, 95 Cal. 430, 30 Pac. 566. Conduct sufficiently aggravated to produce ill health or bodily pain, though operating primarily on the mind only, is legal cruelty.—*Powelson v. Powelson*, 22 Cal. 359. If a husband upon more than one occasion inflicts violence upon the person of his wife, so that the marks thereof remain, he is guilty of extreme cruelty.—*Eidenmuller v. Eidenmuller*, 37 Cal. 364. Violence, profanity and grossly indecent language and conduct toward a wife, with

threats to kill her, and pushing her about in anger and handling her roughly constitute cruelty and inhuman treatment.—*Crichton v. Chricton*, 73 Wis. 59, 40 N. W. 638. The infliction of grievous mental suffering, independent of physical injury, may constitute extreme cruelty; and whether, in any particular case, the ill treatment of the wife by the husband is so unusual as to be beyond that misconduct which may be attributed to the ordinary weaknesses and passions of men, and whether such treatment caused grievous mental sufferings of the wife, are largely questions of fact to be determined by the trial court; and its findings thereupon cannot be disturbed upon appeal, unless the evidence in support of them is so slight as to indicate a want of ordinary good judgment and the abuse of discretion by the trial court.—*Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298.

**Section 2024. Willful Desertion Defined:** Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

1887 R. S. Sec. 2460.

**DESERTION, WHAT IS:** Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert in the mind of the offending party.—*Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Morrison v. Morrison*, 20 Cal. 431.

The word "wilful" in the phrase "wilful desertion by either party," used in the statute concerning divorces, signifies intentional.—*Benkert v. Benkert*, 32 Cal. 468.

Desertion, to constitute a ground of divorce, must have continued up to the time of filing the libel.—*Clark v. Clark*, 10 N. H. 380, 38 Am. Dec. 165.

Separation and intention to abandon must concur to constitute ground for divorce. They need not be identical in commencement, but desertion will commence from the time intention to

abandon is formed.—*Pinkard v. Pinkard*, 14 Tex. 356, 65 Am. Dec. 129.

The act of a woman in leaving her husband for cause is not desertion within the meaning of the law authorizing a divorce for desertion.—*Doolittle v. Doolittle* (Iowa), 6 L. R. A. 187, 43 N. W. 616.

When a husband, not entirely blameless for the act, makes no effort to prevent his desertion by his wife, and acquiescence in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion.—*Herold v. Herold* (N. J.), 9 L. R. A. 696, 20 Atl. 375.

Voluntary abandonment of a wife by her husband is shown where he requires her to leave his house and fails to provide for her support and does not consent to her return.—*Jones v. Jones* (Ala.), 18 L. R. A. 95, 11 So. 11.

**Section 2025. Willful Neglect Defined:** Willful neglect is the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy or dissipation.

1887 R. S. Sec. 2461.

Willful neglect, whether accompanied with desertion or otherwise, is a distinct ground for divorce. The neglect must be such as leaves the wife destitute of the common necessities of life, or such as would leave her destitute, but for the charities of others.—*Washburn v. Washburn*, 9 Cal. 475,

Where a wife's earnings are sufficient for her support, and they are not interfered with by the husband, the neglect of the husband to provide the common necessities of life for the wife is not sufficient ground for a divorce, although the husband be able to earn enough to support the wife.—*Rycraft v. Rycraft*, 42 Cal. 444.

**Section 2026. Habitual Intemperance Defined:** Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

1887 R. S. Sec. 2462.

If there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance, although the person may at intervals be in a condition to attend to his business af-

fairs.—*Mahone v. Mahone*, 19 Cal. 627.

An allegation that defendant had been habitually intemperate to such a degree as to reasonably inflict and cause a great mental suffering upon the plaintiff is sufficient.—*Forney v. Forney*, 80 Cal. 528, 22 Pac. 294; *Reading v. Reading*, 96 Cal. 6, 30 Pac. 803.

**Section 2027. Desertion, Neglect, Intemperance, How Long to Continue:** Willful desertion, willful neglect or habitual intemperance must continue for one year before either is a ground for divorce.

1887 R. S. Sec. 2463.

If there is no finding that the offense continued for the statutory time,

the judgment will be reversed on appeal.—*Dunn v. Dunn*, 62 Cal. 176.

**Section 2028. Permanent Insanity:** No divorce shall be granted on the ground of permanent insanity, unless such insane person shall have been duly and regularly confined in the insane asylum of this State, for at least six years next preceding the commencement of the action for divorce; nor, unless it shall appear to the court that such insanity is permanent and incurable. And provided further, that no action shall be maintained under the provisions of this Chapter, unless the plaintiff shall be an actual resident of this State and shall have resided therein for six years next preceding the commencement of such action.

1899, 5th Ses. p. 232, Sec. 1, rewritten by Commission.

Proceeding for: Code Civil Proc. Sec. 3327.

**Section 2029. Divorces Denied, when:** Divorces must be denied upon showing:

1. Collusion; or
2. Condonation; or
3. Recrimination; or
4. Limitation and lapse of time.

1887 R. S. Sec. 2464.

**Section 2030. Collusion Defined:** Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed, acts constituting a cause of divorce for the purpose of enabling the other to obtain a divorce, and is a bar to an action for such acts.

1887 R. S. Sec. 2465.

The right to a divorce will be barred if plaintiff consented to the employment of a person to allure defendant

into the offense for which the action is brought.—*Dennis v. Dennis* (Conn.), 34 L. R. A. 449, 36 Atl. 34.

**Section 2031. Recrimination Defined:** Recrimination



is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause for divorce.

1887 R. S. Sec. 2466.

The doctrine of recrimination, and the several offenses which, by the statute, constitute grounds of divorce, are pleadable in bar to such suits, the one to the other. To be an absolute

bar, conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant.—*Conant v. Conant*, 10 Cal. 249.

**Section 2032. Condonation:** Condonation of a cause of divorce shown in the answer as a recriminatory defense, is a bar to such defense when the condonee has fully performed the marital duties, and is without reproach since the condonation, or if two or more have elapsed after the condonation.

1887 R. S. Sec. 2467.

If, pending action for divorce, the parties thereto admit condonation, and ask that the action be dismissed, the court should order a dismissal, and thereafter the husband cannot be compelled to pay counsel fees of the wife.—*Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480.

A wife who continues to live with her husband, after an act of personal violence, condones the offense.—*Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 548, 22 N. E. 806.

Where the cause of divorce consists of a course of offensive conduct, or arises in case of cruelty from successive acts of ill treatment which may,

aggregately, constitute the offense, cohabitation or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.—*Smith v. Smith* (Cal.), 48 Pac. 730. And the return of the wife to the husband after a course of cruel treatment, which caused her to leave him, does not establish a condonation, where it appears that the husband thereafter renewed his cruel treatment, and was repeatedly guilty of the same offenses which he had formerly committed.—*Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298.

**Section 2033. Limitation of Time for Commencing Action:** A divorce must be denied:

1. When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or

2. When the cause is conviction of felony, and the action is not commenced before the expiration of one year after a pardon or the termination of the period of sentence;

3. In all other cases where there is an unreasonable lapse of time before the commencement of the action.

1887 R. S. Sec. 2468.

**Section 2034. Residence of Plaintiff:** A divorce must not be granted unless the plaintiff has been a resident of the state for six months next preceding the commencement of the action.

1887 R. S. Sec. 2469; Compiled Laws 1875, p. 639.

Where the plaintiff has not resided within the state six months prior to the commencing of an action for di-

vorce, the court has no jurisdiction and a decree rendered therein is null and void.—*Strode v. Strode* (Idaho), 52 Pac. 161.

**Section 2035. Proof of Actual Residence Necessary:** In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

1887 R. S. Sec. 2470.

The desertion of the husband entitles

the wife to her own domicile.—Moffatt v. Moffatt, 5 Cal. 280.

**Section 2036. Proof Necessary in Divorce Proceedings:** No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers.

1887 R. S. Sec. 2471; Compiled Laws 1875, p. 640.

Section cited in *Strode v. Strode* (Idaho), 52 Pac. 161.

Where in an action for divorce, the cross complaint of the defendant fails to set up a ground of divorce, a decree in favor of defendant upon such cross complaint will be set aside.—*Stover v. Stover* (Idaho), 56 Pac. 263.

The main purpose of this section is to prevent collusion.—*Andrews v. Andrews*, 120 Cal. 1886, 52 Pac. 298, citing

*Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; *Evans v. Evans*, 41 Cal. 103; *Baker v. Baker*, 13 Cal. 88.

It is the policy of the law to discourage divorces; hence, where the plaintiff in a divorce suit asks to dismiss, and no counter cause of action is set up in a cross-complaint or counter-claim, the refusal of the court to make the order dismissing the action is reversible error. — *Stover v. Stover* (Idaho), 61 Pac. 462.

**Section 2037. Alimony Pending Suit:** While an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.

1887 R. S. Sec. 2472.

Although a husband and wife cannot lawfully enter into an agreement for divorce, they may agree as to the amount and terms of payment of alimony, and the court will embody such agreement in its decree.—*Storey v. Storey*, 125 Ill. 608, 1 L. R. A. 320, 18 N. E. 329. Temporary alimony may be granted pendente lite, but the title of

the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for the divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute.—*Houston v. Timmerman* (Or.), 4 L. R. A. 716, 21 Pac. 1037.

**Section 2038. Custody of Children:** In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may be seen necessary or proper, and may at any time vacate or modify the same.

1887 R. S. Sec. 2473; 1875 Compiled Laws, p. 640.

Section cited in *In re Miller* (Idaho), 43 Pac. 870.

If, after a decree of divorce has been granted, and the wife has been awarded the custody of a child, she petitions the court for an order requiring her former husband to make provision for the support of the child, the court may make allowances for the past as well as the future support of the child. And a stipulation of the parties made at the time, that the wife shall receive a certain sum as her part of the common property and shall have the custody of the infant child, and that such sum shall be in full for her allowance

for the support of the child, such stipulation does not deprive the court from afterwards, on her petition, making her an allowance for the support of such child.—*Wilson v. Wilson*, 45 Cal. 399.

A wife by her fault in the matters involved in an action for divorce may forfeit her own claim to be supported by her husband, but she cannot forfeit the claims of their children to such support. *Ex parte Gordon*, 95 Cal. 374, 30 Pac. 561. The refusal of the husband to pay money for the support of a minor child which the court, in an action for divorce, has ordered to be paid, to the one who has the custody of the child, is a contempt of court, punishable by



imprisonment until the money is paid, if the husband is found to have the ability to do so.—Ex parte Gordon, 95 Cal. 374, 30 Pac. 561.

**Section 2039. Husband to Support Wife and Children when:** Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

1887 R. S. Sec. 2474.

An order that the father pay for the support of minor children awarded to the custody of the mother without any provisions for their maintenance by decree of divorce, may be obtained by petition in that case long after the decree has become final and the mother has remarried.—McKay v. Superior

Court, 120 Cal. 143, 40 L. R. A. 585, 52 Pac. 147.

A divorced wife can maintain an action against her former husband for the maintenance of a minor child when the father is found unfit to have the custody of the child and this has been awarded to her.—Gibson v. Gibson, 18 Wash. 489, 40 L. R. A. 587, 51 Pac. 1041.

**Section 2040. Husband may be Required to Give Security:** The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

1887 R. S. Sec. 2475.

**Section 2041. Property Liabie to Costs and Support:** In executing the four preceding sections the court must resort:

1. To the community property; then
2. To the separate property of the husband.

1887 R. S. Sec. 2476.

**Section 2042. Separate Property of Husband not Liabie when:** When the wife has a sufficient separate estate, or there is community property sufficient to give her alimony or proper support, the court must withhold any allowance to her out of the separate property of the husband.

1887 R. S. Sec. 2477.

In an action for divorce, where the complaint states the existence of common property, the court, in addition to granting the divorce, may order a division of the common property and that a homestead be set apart for the plaintiff.—Gimmy v. Gimmy, 22 Cal. 633.

A partition of the common property is one of the direct results of a decree for divorce and is a part and parcel of the decree to be rendered and one of the proper subjects of the action.—Kashaw v. Kashaw, 3 Cal. 312.

**Section 2043. Property Liabie for Education of Children:** The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

1887 R. S. Sec. 2478.

**Section 2044. Adultery of Wife, Legitimacy of Children:** When a divorce is granted for the adultery of the wife the legitimacy of children begotten of her before the commission of the

adultery is not affected; but the legitimacy of other children of the wife may be determined by the court upon the evidence in the case.

1887 R. S. Sec. 2479; Compiled Laws 1875, p. 640.

**Section 2045. Community Property, how Disposed of:** In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:

1. If the decree be rendered on the ground of adultery or extreme cruelty, the community property must be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties deems just;

2. If the decree be rendered on any other ground than that of adultery, or extreme cruelty, the community property must be equally divided between the parties;

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided;

4. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

1887 R. S. Sec. 2480; Compiled Laws 1875, p. 636, Sec. 12.

The husband has the absolute power to dispose of the common property of himself and wife, to the same extent and in the same manner as he has of

his separate property, until a legal separation has been effected by a court of competent jurisdiction, and a division made under the direction of such court.—*Ray v. Ray*, 1 Idaho, 566.

**Section 2046. Order of Court; Sale or Partition of Property:** The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division of other disposition of the proceeds.

1887 R. S. Sec. 2481.

In a decree granting a divorce, a court has no power to order a partition of community real estate, which is in the lawful possession of a mortgagee

under a mortgage covering the whole thereof, until the lien of the mortgage has been satisfied or redeemed.—*Cummings v. Cummings*, 75 Cal. 434, 17 Pac. 442.

**Section 2047. Order Subject to Revision on Appeal:** The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

1887 R. S. Sec. 2482.

The fact that a divorce court has power to modify its orders concerning distribution of property between the

parties does not affect the right of free distribution of property not expressly bound by such orders.—*Whitmore v. Hardin* (Utah), 1 Pac. 465.

**Section 2048. District Court has Exclusive Original Jurisdiction:** Exclusive original jurisdiction of all actions and proceedings under this chapter is in the District Court, and the Judge thereof at chambers may make all necessary orders for temporary alimony and support, and the expenses of the action and the



custody of children and property during the pendency of the action.

1887 R. S. Sec. 2483; Compiled Laws 1875, p. 639.

Section cited in *In re Miller* (Idaho), 43 Pac. 870.

## CHAPTER LXXVIII.

### HUSBAND AND WIFE

Section.

- 2049. Obligations of husband and wife.
- 2050. Husband is head of the family.
- 2051. Separate property of wife.
- 2052. Separate property of husband.
- 2053. Community property.
- 2054. Husband controls separate property of wife.
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- 2056. Inventory of wife's separate property.
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- 2060. Wife's separate property not liable for husband's debts.
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- 2065. Marriage settlements, how made.
- 2066. Contract to be recorded.
- 2067. Effect of recording.
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#### **Section 2049. Obligations of Husband and Wife:**

Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.

1887 R. S. Sec. 2493.

Wife's support of husband: Sec. 2063.

**Section 2050. Husband is Head of the Family:** The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

1887 R. S. Sec. 2494.

Head of family for homestead purposes: Sec. 2494.

**Section 4051. Separate Property of Wife:** All property of the wife, owned by her before marriage; and that acquired afterwards by gift, bequest, devise, or descent is her separate property.

1887 R. S. Sec. 2495; Compiled Laws 1875, p. 635.

**SEPARATE PROPERTY, WHAT IS:** Property purchased in the name of the wife partly with the funds of her separate estate and partly with money borrowed during the existence of the community, is the separate estate of the wife, to the extent to which funds of her separate estate are used and community property to the extent to which such borrowed money is used in its purchase.—*Northwestern and P. Hypotheek Bank v. Rauch* (Idaho), 61 Pac. 516. Separate property of husband or wife is that which is held both in its use and in its title for the exclusive benefit of the spouse holding the same.—*Kraemer v. Kraemer*, 52 Cal. 302; *Peck v. Brummagim*, 31 Cal. 440; and the property remains such although

converted into other property.—*Kraemer v. Kraemer*, *supra*.

**GIFT BY HUSBAND:** If the husband is not indebted at the time, he has the right to give to the wife property purchased by him with community funds, and may make the gift effectual by simply directing the deed of bargain and sale to be made to her.—*Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695, and all intending purchasers or incumbrancers are bound to take notice that property conveyed to a married woman by deed of bargain and sale is her separate property.—*Ibid*. If the husband erect a house on the wife's separate property with community funds, the house becomes the separate property of the wife if it is a part of the realty.—*Peck v. Brummagim*, 31 Cal. 441.



**Section 2052. Separate Property of Husband:** All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent is his separate property.

1887 R. S. Sec. 2496; Compiled Laws 1875, p. 635.

Section cited in *Kneen v. Halin* (Idaho), 59 Pac. 14.

**Section 2053. Community Property:** All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband or wife, is community property; unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband.

1887 R. S. Sec. 2497; Compiled Laws 1875, p. 636.

**COMMUNITY PROPERTY, WHAT IS:** As a rule, property purchased with money borrowed by either spouse during the existence of the community, is community property.—*Northwestern & P. Hypotheek Bank v. Rauch* (Idaho), 61 Pac. 516.

Mining property acquired in this state under the laws of the United States during coverture is community property. This is true, although the wife may never have been a resident of this state.—*Jacobson v. Bunker Hill & Sullivan Mining Company*, 2 Idaho, 863, 28 Pac. 396, as a man may live separate and apart from his wife and still not abandon her in the sense in which the term is used in our statute, abandonment being largely a question of intent.—*Ib.*

Where H. made settlement upon the public domain, subject to the pre-emption laws of the United States, and made pre-emption filing for the same, and resided thereon with his wife, and thereafter, while so residing thereon, borrowed money to pay the purchase price of said land from the government, and executed a mortgage to secure the payment of the same, and afterwards paid the government price therefor from the money so borrowed, said real property was not community property at the date of the execution of said mortgage, and said mortgage is a valid lien on said land without being signed by the wife, (see Sec. 3336 R. S.) and is prior to any right of the wife acquired by reason of its becoming community property thereafter.—*Kneen v. Halin et ux.* (Idaho), 59 Pac. 14, cases cited.

The wife's signature is not necessary to an instrument by which the husband conveys or incumbers that part of the community property of which he has absolute power of disposition.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

Loss of ability to labor is an element of general damage to be considered by the jury in an action brought by husband and wife to recover for a tortious injury to the wife, the amount so recovered being, under the laws of Idaho, community property of both husband and wife.—*Giffen et ux. v. City of Lewiston* (Idaho), 55 Pac. 545.

**PRESUMPTIONS AS TO COMMUNITY PROPERTY:** The pleadings show that the notes and mortgage were executed by both husband and wife, but it nowhere appears in the record whether the mortgaged premises were the separate property of either husband or wife, or their community property. Under these circumstances the presumption is that the mortgaged premises were community property. But whether the property was the separate property of the husband, or the separate property of the wife, or the community property of both, under the provisions of Sec. 4093, Rev. St., the husband was a necessary party although the mortgaged property is the separate property of the wife, unless they are living separate and apart, by reason of the desertion of the husband, or by agreement in writing entered into between them, neither of which conditions is shown to exist. But, owing to the presumption that the mortgaged premises were community property, the control of the same is in the husband, and he is a necessary party.—*Vermont Loan & Trust Co. v. McGregor et al.* (Idaho), 51 Pac. 104.

S. and wife acquired lands during coverture, the title being conveyed to S. in 1871, and 1873. The wife died in 1877, leaving her husband and four children surviving her. S. again married. In 1877 S. and his second wife, by deed, for the consideration of \$7,450, conveyed said lands to K. In 1895 the children of S. and his deceased wife brought suit against the heirs of K., who had died, for a partition of the

said lands; claiming under their deceased mother, by reason of an act passed in 1874, and repealed in 1879, giving the community property, on the death of one spouse, one-half to the surviving spouse, and the other half to the descendants of the deceased spouse, subject to the debts of the deceased. Plaintiffs did not allege or prove the extent of the assets and liabilities of the community at the death of their deceased mother, nor that the community was free from debt, nor that K. purchased with notice of their

claims. The trial court gave judgment of non-suit, from which the plaintiffs appealed. Held, that the surviving spouse held the legal title, one-half for himself and the other half in trust for plaintiffs; that the husband could sell the lands to pay community debts, and that the existence of such debts, and of the necessity of sale, are presumed from the lapse of time; and that judgment of non-suit was proper.—*Von Rosenberg et al. v. Perrault et al.* (Idaho), 51 Pac. 7774.

**Section 2054. Husband Controls Separate Property of Wife:** The husband has the management and control of the separate property of the wife, during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination, separate and apart from the husband, as upon a conveyance of real estate.

1887 R. S. Sec. 2498; Compiled Laws 1875, p. 635.

**IMPROVEMENTS ON WIFE'S SEPARATE PROPERTY:** Under the statutes of Idaho, a married woman may contract for improvements upon her separate property, and a debt so incurred does not come within the inhibitions of this section.—*Bassett v. Beam et al.* (Idaho), 36 Pac. 501. A married woman may contract debts for the use and benefit of her separate property, or for her own use and benefit, and thereby charge her separate property; but in order to charge such, and render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use or benefit of her separate property, or for her own use and benefit.—*Dernham v. Rowley* (Idaho), 44 Pac. 643.

**HUSBAND'S CONTROL OF SEPARATE PROPERTY:** The right of the husband, under the statute defining the

rights of husband and wife, to control and manage the separate property of the wife, does not carry with it the right to sell the wife's personal property.—*O'Brien v. Foreman*, 46 Cal. 81. If the husband manages the separate property of the wife, he must manage it as her separate property, and she is entitled to enjoy the income.—*Wilson v. Wilson*, 36 Cal. 447. The assent of the husband is required, not only to the sale by the wife of her separate property, but also to her conveyance of the same, and that assent must be expressed by his signature to the conveyance, made by himself, and he cannot, by a letter of attorney, delegate to another the power to subscribe his name to such conveyance.—*Meagher v. Thompson*, 49 Cal. 189.

A deed of husband and wife, conveying separate property of wife, need not be signed or acknowledged by both at same time.—*Andola v. Picott* (Idaho), 46 Pac. 928.

**Section 2055. Mismanagement by Husband; Appointment of Trustee:** If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she, or any other person in her behalf, may apply to the District Court for the appointment of a trustee to take charge of and manage her separate estate; such trustee may, for good cause shown, be, from time to time, removed by the court, and another appointed in his place. Before entering upon the discharge of his trust, he must execute a bond with sufficient sureties, to be approved by the court for the performance of his duties. In case of the appointment of a trustee for the wife, he must account for and pay over to the husband and wife, or either of them, the income



and profits of the wife's estate in such manner and proportion as the court may direct.

1887 R. S. Sec. 2499; Compiled Laws 1875, p. 635.

**Section 2056. Inventory of Wife's Separate Property:**

A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.

1887 R. S. Sec. 2500; Compiled Laws 1875, p. 635.

**Section 2057. Effect of Filing Inventory:** The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.

1887 R. S. Sec. 2501; Compiled Laws 1875, p. 635.

**Section 2058. Earnings of Wife and Children, Her Property when:** The earnings and accumulations of the wife and of her minor children living with her or in her custody, while she is living separate from her husband are the separate property of the wife.

1887 R. S. Sec. 2502.

Wife may become a sole trader: Code Civil Proc. Chap. CLXXXIII.

**Section 2059. Husband's Property not Liable for Certain Debts of Wife:** The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

1887 R. S. Sec. 2503; Compiled Laws 1875, p. 637.

**LIABILITY OF HUSBAND FOR DEBTS OF WIFE:** By the common law, the husband, during coverture is responsible for debts of the wife contracted dum sola. Our statute modifies this law in two respects: it renders the

separate property of the wife liable, and exempts the separate property of the husband. Beyond this exemption of the separate property the liability of the husband exists—that is he is liable to the extent of the common property.—*Van Maren v. Johnson*, 15 Cal. 308.

**Section 2060. Wife's Separate Property not Liable for Husband's Debts:** The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage.

1887 R. S. Sec. 2504; Compiled Laws 1875, p. 637.

**ACTION AGAINST SEPARATE ESTATE:** In order to charge the separate property of a wife, or render it liable to levy and sale, it must be alleged in the complaint, and proven, that the debt was incurred for the use

or benefit of her separate property, or for her own use and benefit, for which purposes a married woman may contract debts, and thereby charge her separate property.—*Dernham v. Rowley* (Idaho), 44 Pac. 643; *Bassett v. Beam* (Idaho), 36 Pac. 501.

**Section 2061. Power of Husband Over Community Property:** The husband has the management and control of the community property, with the like absolute power of disposition (other than testamentary) as he has of his separate estate; but such power of disposition does not extend to the homestead or that part of the common property occupied or used by the husband and wife as a residence.

1887 R. S. Sec. 2505.

**WIFE'S SIGNATURE UNNECESSARY:** The wife's signature is not necessary to an instrument by which the husband conveys or incumbers that part of the community property of which he has absolute power of disposition.—*Wilson v. Wilson et al.* (Idaho), 57 Pac. 708.

**HUSBAND'S POWER:** The husband has the management and control of the community property with like absolute power of the disposition (other than testamentary) as he has of his separate property but such power of disposition does not extend to the homestead or to the part of the common property occupied or used by the husband and wife as a residence.—*Wilson v. Wilson* (Idaho), 57 Pac. 708; and this power over community property continues until a legal separation has been effected, by a court of competent jurisdiction, and a division made under the direction of said court.—*Ray v. Ray*, 1 Idaho, 566.

The husband may encumber by mortgage without the wife joining him an undivided interest in lands not a homestead nor used as a residence which belonged to the community, although the wife may have a separate

estate in said lands.—*Northwestern and P. Hypotheek Bank v. Rauch*, 61, Pac. 516.

**WIFE'S DISABILITY:** A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife, on a note signed by both, in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate.—*Jaeckel v. Pease et al.* (Idaho), 53 Pac. 399.

**WIFE'S INTEREST IN RESIDENCE:** The only estate or interest the wife has in that portion of the community property which is occupied as a residence, and not dedicated as a homestead, is subject to the control of the husband, except as to alienation or encumbrance, and residence can be changed or abandoned at any time by the husband without the consent of the wife; and when such change or abandonment has taken place, the property is again under the absolute control of the husband, unless the same has been dedicated as a homestead, as provided by law.—*Law v. Spence* (Idaho), 48 Pac. 282.

**Section 2062. Courtesy and Dower not Allowed:** No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

1887 R. S. Sec. 2506; Compiled Laws 1875, p. 636.

**Section 2063. When Wife Must Support Husband:** The wife must support the husband out of her separate property when he has no separate property, and they no community property, and he from infirmity is not able or competent to support himself.

1887 R. S. Sec. 2507.

**Section 2064. Rights of Property Governed by this Chapter:** The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

1887 R. S. Sec. 2508; Compiled Laws 1875, p. 637.

Attorneys cannot by stipulation bind a married woman in a case where she

could not bind herself, or make her liable on a contract that she has never executed.—*Strode v. Miller* (Idaho), 59 Pac. 893.

**Section 2065. Marriage Settlements, How Made:** All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as conveyances of land are required to be executed and acknowledged or proved.

1887 R. S. Sec. 2509; Compiled Laws 1875, p. 637.

**Section 2066. Contract to be Recorded:** When such contract is acknowledged or proved, it must be recorded in the office



of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

1887 R. S. Sec. 2510; Compiled Laws 1875, p. 637.

**Section 2067. Effect of Recording:** The recording or non-recording of such contract has a like effect as the recording or non-recording of a conveyance of real property.

1887 R. S. Sec. 2511; Compiled Laws 1875, p. 637.

**Section 2068. Minor May Make Marriage Settlement**  
**When:** A minor capable of contracting marriage may make a valid marriage settlement.

1887 R. S. Sec. 2512; Compiled Laws 1875, p. 637.

## CHAPTER LXXIX.

### PARENT AND CHILD.

#### Section.

- 2069. Child becomes legitimate, when.
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- 2072. Liability of parent for necessities.
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#### CHILDREN BY ADOPTION.

- 2075. Minor child may be adopted.
- 2076. Age of person adopting child.

#### Section.

- 2077. Consent to adopt, when necessary.
- 2078. Consent of parents, when necessary.
- 2079. Consent of child, when necessary.
- 2080. Proceedings on adoption.
- 2081. Order of judge on adoption.
- 2082. Effect of adoption.
- 2083. Former parents have no rights over child.
- 2084. Father of illegitimate child may adopt.

#### CHILDREN BY BIRTH.

**Section 2069. Child Becomes Legitimate, When:** A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

1887 R. S. Sec. 2535; 1877, 9th Ses. p. 27, Sec. 21.

**Section 2070. Allowance to Parent from Child's Property:** The proper court may direct an allowance to be made to the parent of a child, out of its property for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

1887 R. S. Sec. 2530.

When parent may support child out of its estate: See exhaustive discussion

of this subject in note to *Myers v. Myers*, 16 Am. Dec. 661.

**Section 2071. Support of Poor Person:** It is the duty of the father, the mother and the child or children of any poor person who is unable to maintain himself or herself by work, to maintain such poor person to the extent of his or her ability. And whenever any person shall apply for aid to any county within this state under its indigent laws, and it shall at any time appear to the county commissioners that said poor person has a father, mother, child or children who is able to maintain him or her, but fails so to do, it shall be the duty of the said commissioners to furnish all necessary aid and

to bring a civil suit against such father, mother, child or children to recover the amount so expended, in the name of the county. The promise of an adult child to pay for necessities previously furnished to such parents is binding.

1899, 5th Ses. p. 301; 1897, 4th Ses. p. 52. Amending laws of 1887 R. S. Sec. 2531.

The father is not liable for his son's support to any extent after majority,

unless he has become subject to the condition of a pauper and liable to be a public burden.—Clinton v. Laning, 61 Mich. 359, 28 N. W. 125.

**Section 2072. Liability of Parent for Necessaries:** If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent.

1887 R. S. Sec. 2532.

**Section 2073. Wages of Minor:** The wages of a minor employed in service may be paid to him, unless within thirty days after the commencement of the service, the parent or guardian entitled thereto gives the employer notice that he claims such wages.

1887 R. S. Sec. 2533.

A minor child emancipated by his father is freed by emancipation from parental control; he can claim his

earnings thereafter as against his father, and is in all respects his own man.—Lackman and Backen v. Wood, 25 Cal. 147.

**Section 2074. Custody of Child When Parents Separated:** When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court must be guided by the welfare of the child.

1887 R. S. Sec. 2534.

Section 3925 of the Revised Statutes granting jurisdiction is very broad; and a temporary order providing for the care and custody of an infant child which by section 2534 Revised Statutes,

2074 of this Code, is given to the judges of the district court, may be issued by the judges of the district court at chambers.—In re Miller (Idaho), 43 Pac. 870.

#### CHILDREN BY ADOPTION.

**Section 2075. Minor Child May be Adopted:** Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this subdivision.

1887 R. S. Sec. 2545; 1879, 10th Ses. p. 8.

In order to effect a legal adoption, there must be a substantial compliance

with all the essential requirements of the law under which the right is claimed.—Estate of Johnson, 98 Cal. 531, 33 Pac. 460.

**Section 2076. Age of Person Adopting Child:** The person adopting a child must be at least fifteen years older than the person adopted.

1887 R. S. Sec. 2546; 1879, 10th Ses. p. 9.

**Section 2077. Consent to Adopt, When Necessary:** A



married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife; nor can a married woman, not thus separated from her husband adopt a child without his consent, provided the husband or wife, not consenting, is capable of giving such consent.

1887 R. S. Sec. 2547; portion from laws 1879, 10th Ses. p. 9.

**Section 2078. Consent of Parents, When Necessary:**

A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty or neglect. If it can be shown satisfactorily to the judge that the parent or parents have abandoned, or ceased to provide for its support, then it may be adopted by the written consent of its legal guardian. If no guardian, then of its nearest relative. If no relative, then by the consent of some person appointed by the judge to act in the proceedings as the next friend to such child.

1887 R. S. Sec. 2548; 1879, 10th Ses. p. 9.

A parent cannot be deprived of his rights in respect to a child by proceedings for its adoption based on a charge of his abandonment of the child, where he has no notice of the proceedings or opportunity to defend.—Schlitz v.

Roenitz, 86 Wis. 31, 21 L. R. A. 483, 56 N. W. 194. A man who has abandoned his child is not entitled to notice of proceedings for the legal adoption of the child by another person, where the mother of the child is a party and consents to the adoption.—Nugent v. Powell (Wyo.), 20 L. R. A. 199, 33 Pac. 23.

**Section 2079. Consent of Child, When Necessary:**

The consent of a child, if over the age of twelve years, is necessary to its adoption.

1887 R. S. Sec. 2549; 1879, 10th Ses. p. 9.

**Section 2080. Proceedings on Adoption:** The person adopting a child, and the child adopted, and the other persons, if within or residents of the county, whose consent is necessary, must appear before the probate judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. But if the parent or guardian of the child, or either of them, is a non-resident of the county where the application is made, such non-resident parent or guardian may execute his consent in writing, and acknowledge the same before any officer authorized by the laws of this state to take acknowledgments of deeds, which consent being filed in the court where the application is made, is deemed a sufficient appearance on the part of such non-resident..

1887 R. S. Sec. 2550; 1885, 13th Ses. p. 25; 1879, 10th Ses. p. 9.

**Section 2081. Order of Judge on Adoption:** The judge must examine all persons appearing before him pursuant to the



last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child thenceforth be regarded and treated in all respects as the child of the person adopting.

1887 R. S. Sec. 2551; 1879, 10th Ses. p. 9.

**Section 2082. Effect of Adoption:** A child, when adopted, may take the name of the person adopting, and the two thenceforth sustain toward each other the legal relation of parent and child and have all the rights and are subject to all the duties of that relation.

1887 R. S. Sec. 2552; 1879, 10th Ses. p. 9.

**Section 2083. Former Parents Have no Rights Over Child:** The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

1887 R. S. Sec. 2553; 1879, 10th Ses. p. 9.

**Section 2084. Father of Illegitimate Child May Adopt:** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this subdivision do not apply to such an adoption.

1887 R. S. Sec. 2554; 1879, 10th Ses. p. 9.

acknowledge and treat it as his child in such family as he may have, and otherwise treat it as if it were a legitimate child.—In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028. This section applies only to illegitimate minor children.—The Estate of Picot, 52 Cal. 84; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028.

The public acknowledgment of an illegitimate child required by this section in order to adopt and legitimize it as the heir of its father who is unmarried, requires that he should hold the child out to his relatives, friends, acquaintances and the world and

## TITLE XI.

### CORPORATIONS.

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## CHAPTER LXXX.

### GENERAL PROVISIONS.

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**Section 2085. Corporations are Public or Private:**  
Corporations are either public or private. Public corporations are



formed or organized for the government of a portion of the state; all other corporations are private.

1887 R. S. Sec. 2575

### **Section 2086. Private Corporations, How Formed:**

Private corporations may be formed by the voluntary association of any five or more persons in the manner prescribed in this title. Provided one of such persons must be a bona fide resident of this state.

1887 R. S. Sec. 2576, amended 1899, 5th Ses. p. 404.

**FORMATION OF PRIVATE CORPORATION:** In incorporating under general law, a strict compliance with all the requirements of the statutes in matters of detail is not essential, and the proceedings will not be held invalid for slight defects or omissions.—*Smith Valley Waterworks v. San Francisco*, 22 Cal. 434; *People v. Stockton R. Co.* 45 Cal. 306. But a substantial compliance with the forms of an act by the persons seeking to derive the benefits of an incorporation must be observed and the omission of essential steps will be fatal.—*Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 424; *Harris v. McGregor*, 29 Cal. 124; *People*

*v. Selfridge*, 52 Cal. 331. A corporation exists only in contemplation of law and by force of law, and can have no legal existence beyond the state or sovereignty by which it is created.—*Rece v. Newport News M. B. Ry. Co.* 32 W. Va. 134, 3 L. R. A. 572, 9 S. E. 212. And the right to be a corporation is a franchise, and to acquire a franchise under the general law, the statutory conditions must be complied with.—*People v. Selfridge*, 52 Cal. 331.

A private corporation is not made a public institution by the fact that it is subject to visitation and inspection by public officials.—*Wis. Keeley Institute Co. v. Milwaukee Co.*, 95 Wis. 153, 36 L. R. A. 55, 70 N. W. 68.

**Section 2087. For What Purpose May Form:** Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

1887 R. S. Sec. 2577.

**PURPOSE:** A corporation for the purpose of dealing in real estate and carrying on any kind of real estate business cannot be organized under the section of the code providing for corporations organized for improvements on real property.—*Vercoutere v. Golden State Land Co.* 116 Cal. 410, 48 Pac. 375. Similarly, a corporation organized for the purpose of building a union depot for railroads and of owning, maintaining, etc., different lines therefrom within the city limits, is not an ordinary railway company.—*People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716. In general, when a corporation is formed for a specific purpose, it has implied powers incidental to that purpose, but the exercise of a power not expressed which

could not reasonably be implied as incidental to the specific purpose for which it was formed, is unlawful.—*Id.*; *Stockton v. Central Ry. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964. So conditions and limitations attach by law, and the exercise of any given corporate purpose cannot be destroyed or subverted by combining such purposes with some other under one corporation.—*International Fraternal Alliance v. State*, 86 Md. 550, 40 L. R. A. 187, 39 Atl. 512. And where a corporation is organized under a general statute and the provision and declaration of its corporate purpose, the necessary effect of which is the creation of a monopoly, it is void as against public policy.—*People v. Chicago Trust Co.* 130 Ill. 263, 8 L. R. A. 497, 22 N. E. 798.

**Section 2088. Articles of Incorporation:** The instrument by which a private corporation is formed, is called "Articles of Incorporation."

1887 R. S. Sec. 2578.

The articles of incorporation under which a company is organized under general laws have the effect of a charter for the purpose of determining the

powers of the corporation.—*North Point Consolidated Irrigation Co. v. Utah & St. L. Canal Co.* 16 Utah 246, 40 L. R. A. 851, 52 Pac. 168.

**Section 2089. What Articles Must Set Forth:** Articles of incorporation must be prepared setting forth:



First. The name of the corporation;

Second. The purpose for which it is formed;

Third. The place where its principal business is to be transacted;

Fourth. The term for which it is to exist, not exceeding fifty years;

Fifth. The number of its directors or trustees; and the names and residence of those who are appointed for the first year; *Provided*, At any time during the existence of the corporation, the number of the directors may be increased, in corporations for profit, by a majority of the stockholders of the corporation, to any number not exceeding eleven, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for the filing of original articles of incorporations;

Sixth. The amount of the capital stock, and the number of shares into which it is divided;

Seventh. If there is a capital stock, the amount actually subscribed, and by whom.

1887 R. S. Sec. 2579.

**LOCATION:** A certificate which does not set forth the name of the city or town and county in which the principal place of business of a corporation is to be located, does not establish existence of a corporation.—*Harris v. McGregor*, 29 Cal. 124.

**DIRECTORS:** If the articles of incorporation do not state that a majority of the members were present and voted at the election of directors.

the certificate does not constitute the association a corporation.—*People v. Selfridge*, 52 Cal. 331.

**TERM:** Where a statute provides that a corporation shall not exist to exceed twenty years, but the articles of incorporation provide for an existence of fifty years, held, that the corporation may exist for twenty years.—*People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716.

**Section 2090. Further Statement of Certain Corporation:** The articles of incorporation of any railroad, wagon road or telegraph organization must also state:

First. The kind of road or telegraph intended to be constructed;

Second. The place from and to which it is intended to be run, and all the intermediate branches;

Third. The estimated length of the road or telegraph line.

1887 R. S. Sec. 2580.

Under provisions similar to this section and the preceding, in California, it was held that the articles of incorporation of a railroad company must fully set forth amounts subscribed and by

whom. The liability of stockholders at the date of the filing is limited to those named in the articles and to the amounts therein mentioned.—*Monterey and S. V. Ry. Co. v. Hildreth*, 53 Cal. 123.

**Section 2091. Articles, How Executed:** The articles of incorporation must be subscribed by five or more persons, one or more of whom must be resident freeholders of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

1887 R. S. Sec. 2581, as modified by 1899, 5th Ses. p. 404.

**PLACE OF EXECUTION:** Where the essential prerequisites to the formation of a corporation as prescribed by statute are a certificate of certain form, containing statements signed by the incorporators, an acknowledgment thereof before some officer competent to take acknowledgments of deeds, and

its filing with the secretary of state and the recorder of deeds in the county wherein is situated its principal place of business, it is not necessary that such certificate be executed within the limits of the state.—*Humphreys v. Mooney*, 5 Colo. 282. Under similar provision, held that a complaint showing that the articles of incorporation were

signed by five persons and acknowledged by four only, stated a cause of action.—*People v. Montecito Water Co.* 97 Cal. 276, 32 Pac. 236.

**Section 2092. Prerequisites of Certain Corporations in Filing Articles:** Each intended railroad, wagon road or telegraph corporation, before filing articles of incorporation, must have actually subscribed to its capital stock for each mile of the contemplated work, the following amount, to-wit:

First. One thousand dollars per mile of railroads;

Second. One hundred dollars per mile of telegraph lines;

Third. Three hundred dollars per mile of wagon roads.

1887 R. S. Sec. 2582.

**Section 2093. Affidavit of Subscription Before Certificate Issues:** Before the secretary of state or the recorder of the county issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary or treasurer named in the articles that the amount of the capital stock thereof required by law has been actually subscribed.

1887 R. S. Sec. 2583.

**BIRTH OF CORPORATION:** A corporation dates from the time of filing its charter and it is not prerequisite

that all of its capital stock should be subscribed for it to transact business.

—*Chicago K. W. R. Co. v. Putnam* (Kan.), 12 Pac. 593.

**Section 2094. Articles, Where Filed, Certificate, Term:** Upon filing the articles of incorporation in the office of the county recorder of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county recorder, with the secretary of state, and filing the affidavit mentioned in the last section, when such affidavit is required, the secretary of state or such county recorder must issue to the corporation, over his official seal, a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office; and thereupon the persons executing the articles and their associates and successors shall be a body politic and corporate, by the name stated in the articles, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided.

1887 R. S. Sec. 2584.

Where the articles of incorporation state one county to be the principal place of business and instead of being filed in that county as required by the

statute, are filed in another county, the corporation does not become one de jure.—*Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368.

**Section 2095. Copy of Articles as Evidence:** A copy of any articles of incorporation filed in pursuance of this Title and certified by the secretary of state, or the recorder of the proper county, must be received in all courts and other places as prima facie evidence of the facts therein stated.

1887 R. S. Sec. 2585.

A copy of the articles of incorporation filed in the office of the county clerk of the county in which the principal business of the company is con-

ducted as required by statute, is prima facie evidence of corporate existence.—*Fresno Canal and Irrigation Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.



**Section 2096. Stockholders and Members Defined:**

The owners of shares in a corporation which has a capital stock, are called stockholders. If a corporation has no capital stock, the incorporators and their successors are called members.

1887 R. S. Sec. 2586.

**Section 2097. Prerequisite of Holding Property in Any County:** No corporation formed under the provisions of this Title, shall purchase, locate, or hold, property in any county of this state, without filing a certified copy of its articles of incorporation in the office of the county recorder of the county in which such property is situated, within sixty days after such purchase or location is made. Any corporation failing to comply with the provisions of this section, must not, while so in default, maintain or defend any action or proceeding in relation to such property.

1887 R. S. Sec. 2587.

**FOREIGN CORPORATIONS:** In California, it is held that the section does not by its terms apply to or include foreign corporations, but applies only to domestic corporations, who have filed a copy of the articles of incorporation with the secretary of state of California.—*South Yuba, etc., Min. Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222.

**PENALTY FOR NON-COMPLIANCE:** Non-compliance with this requirement is a matter to be set up by defendant in an action for ejectment brought by the corporation for the property. A denial of the existence of the corporation does not raise the

question.—*Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886. But a failure to file copy of the articles of incorporation with the county clerk of the county in which the property of the corporation is situated, does not prevent the corporation from defending an action brought against it to recover for work or labor alleged to have been performed on such property.—*Weeks v. Garibaldi S. G. M. Co.* 73 Cal. 599, 15 Pac. 302. Likewise, the prohibition as to bringing suit does not apply to an action to foreclose a mortgage.—*Savings and Loan Society v. McKoon* (Cal.), 52 Pac. 305.

**Section 2098. By-Laws, When and How Adopted:**

Every corporation formed under this Title must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the laws of this state. The assent of stockholders representing a majority of all the subscribed capital stock, or a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and if such meeting be called, two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or, if none be published therein, then in a paper published at the capital of the state, must be given by order of the acting president. The written assent of the holders of two-thirds of the stock subscribed, or of two-thirds of the members, if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose.

1887 R. S. Sec. 2588.

**TIME OF ADOPTION:** A stockholder of a corporation is bound by its articles of incorporation and by its duly and regularly adopted by-laws whether he has signed them or not.—*McFadden v. Board of Supervisors of Los Angeles Co.* 74 Cal. 571, 16 Pac. 397,

Under this section which provides for the adoption of by-laws after the organization of the corporation, a copy of the by-laws prepared and signed by the stockholders before organization is invalid.—*Vercoutere v. Golden State Land Co.* 116 Cal. 410, 48 Pac. 375. But if a course of action contrary to the



by-laws is acquiesced in by the shareholders, the by-law is thereby waived and will not affect the rights of the persons dealing with the corporation in good faith, even though such persons may be shareholders, if they did not have actual notice of the by-law.—*Underhill v. Santa Barbara, etc., Co.* 93 Cal. 300, 28 Pac. 1049.

**REPEAL:** A by-law of a corporation is a creature of it, acting through and by its stockholders, and generally for their benefit alone and the same authority that enacted it may repeal it or waive its operation.—*Underhill v. Santa Barbara, etc., Co.* 93 Cal. 300, 28 ac. 1049.

**Section 2099. Directors, Election of:** The directors of a corporation must be elected annually by the stockholders or members, and if no provision is made in the by-laws for the time of the election, the election must be held on the first Tuesday in June. Notice of such election must be given, and the right to vote determined as prescribed in the last preceding section.

1887 R. S. Sec. 2589.

**Section 2100. By-Laws, for What May Provide:** A corporation may, by its by-laws, where no other provision is specially made, provide, among other things:

First. The time, place, and manner of calling and conducting its meetings;

Second. The number of stockholders or members constituting a quorum;

Third. The mode of voting by proxy;

Fourth. The time of the annual elections of directors, and the mode and manner of giving notice thereof;

Fifth. The duties and compensation of officers;

Sixth. The manner of election, and the terms of office of all officers other than the directors; and

Seventh. Suitable penalties for violation of by-laws, not exceeding, in any case, one hundred dollars for any one offense.

1887 R. S. Sec. 2590.

**TIME AND PLACE:** Sufficient notice to stockholders is given by charter or by-law which fixes the time and place.—*Morrill v. Little Falls Manufacturing Co.* 53 Minn. 371, 20 L. R. A. 174, 55 N. W. 547. When there is no provision, see Sec. 2117.

**PROXIES:** The regulation of a corporation that votes may be cast by proxy is a reasonable regulation, uniform in its application and works no wrong on any of the stockholders.—*Detwiler v. Commonwealth*, 131 Pa. 614, 7 L. R. A. 357, 18 Atl. 990. A proxy made by the holder of stock while he was enjoined from voting it directly on the ground of public policy, cannot carry the right to vote it.—*Clarke v. Central R. Co.* 50 Fed. Rep. 338, 15 L.

R. A. 683. This provision is construed as not intending to authorize a by-law forbidding all the stockholders from casting proxy votes.—*People's Home Sav. Bank v. Superior Court*, 104 Cal. 649, 38 Pac. 452.

**PROXY AGREEMENTS:** A written agreement between purchasers of stock that they will for five years "retain the power to vote the shares in one body and that the vote which shall be cast by said shares shall be determined by ballot between them or their survivors" is a proxy authorizing the vote of all the stock to be cast in accordance with the determination of the majority.—*Smith v. S. F. and N. P. R. Co.* 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

**Section 2101. "Book of By-Laws," Public; Amendments—How Made:** All by-laws adopted must be certified by a majority of the directors and the secretary of the corporation, and copied in a legible hand in some book kept in the principal office of the corporation in this state, to be known as the "Book of By-Laws,"

and no by-law shall take effect until so copied, and the book shall be open to the inspection of the public during office hours of each day, except holidays. The by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting of the stockholders or members called for that purpose by the directors, by a vote representing two-thirds of the subscribed stock, or two-thirds of the members when there is no capital stock, or the power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, be delegated to the board of directors. This power, when so delegated, may be revoked by a similar vote at any regular meeting of the stockholders or members.

Whenever any amendment or new by-law is adopted, it shall be copied in the book of by-laws with the original by-laws, and immediately after them, and shall not take effect until so copied. If any by-law be repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted, must be stated in the said book, and until so stated the repeal must not take effect.

1887 R. S. Sec. 2591.

**NOTICE:** When actual notice of by-laws is necessary, it must be proved against shareholders and agents as well as against strangers by direct or

presumptive evidence and cannot be imputed by an arbitrary rule of law.—*Underhill v. Santa Barbara, etc. Co.* 93 Cal. 300, 28 Pac. 1049.

**Section 2102. Directors, Number of; Vacancies, How Filled:** The corporate powers, business and property of all corporations formed under this Title must be exercised, conducted and controlled by a board of not less than five nor more than eleven directors, to be elected from among the holders of stock, or when there is no capital stock, then from among the members of such corporation. A majority of the directors must be, in all cases, citizens and actual bona fide residents within this state.

Directors of corporations for profit must be holders of stock therein, in an amount to be fixed by the by-laws. Directors of all other corporations must be members thereof. Unless a majority is present and acting, no business performed or act done by the board of directors is valid as against the corporation. Whenever a vacancy occurs in the office of director, unless otherwise provided by the by-laws, such vacancy must be filled by the board.

1887 R. S. Sec. 2592, as modified by 1899, 5th Ses. p. 404.

**ELIGIBILITY:** To be eligible as a director under statute which requires directors to be stockholders, a person must appear to be a stockholder on the corporate records.—*In re Argus Printing Co.* 1 N. D. 434, 12 L. R. A. 781, 48

N. W. 347, and the transferee of stock on the corporate records is qualified to vote and to become a director although the transfer was made for the sole purpose of so qualifying him, if it was not in furtherance of a fraudulent scheme.—*Id.*

**Section 2103. First Directors, When Elected:** At the first meeting at which the by-laws are adopted, or at such subsequent meeting as may be then designated, directors must be elected, to hold their offices for one year, and until their successors are elected and qualified.

1887 R. S. Sec. 2593.



**Section 2104. Elections, How Conducted; Manner of Voting:** All elections of directors must be by ballot, and a vote of stockholders representing a majority of the subscribed capital stock, or of a majority of the members, if there be no capital stock, is necessary to a choice.

If there be capital stock in the corporation, each stockholder shall have the right to vote in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and such directors shall not be elected in any other manner.

1887 R. S. Sec. 2594, rewritten to conform to Constitution Art. XI, Sec. 4.

**SUPERVISION:** The election of directors may be supervised and controlled by a court of equity and a master appointed to preside, whenever it is made to appear that by means of fraud, violence or other unlawful con-

duct on the part of a portion of the corporators, a fair and honest election cannot otherwise be held.—*Tunis v. Hestonville M. and F. Pass.* R. Co. 149 Pa. 70, 15 L. R. A. 665, 24 Atl. 88.

"Election" and "selection:" See note under Sec. 2112.

**Section 2105. Organization of Board; Quorum:** Immediately after their election, the directors must organize by the election of a president, who must be one of their number, a secretary and a treasurer. They must perform the duties enjoined on them by law and by the by-laws of the corporation. A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is a valid corporate act, as though made by a majority of all the directors of the corporation.

1887 R. S. Sec. 2595.

**Section 2106. Prohibitions on Directors Respecting Dividends and Capital Stock:** The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock nor must they reduce or increase the capital stock, except as in this Title specially provided.

For a violation of the provisions of this section, the directors under whose administration the same may have occurred, (except those who may have caused their dissent therefrom to be entered at large on the minutes of directors at the time, or, when not present, when the same did occur) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence.



1887 R. S. Sec. 2596.

**CAPITAL STOCK:** The "capital stock" of a corporation which the directors are forbidden to divide within the meaning of the section is the actual property of the corporation contributed by the shareholders of the nominal or share capital.—*Excelsior Water and Min. Co. v. Pierce*, 27 Pac. 44, 90 Cal. 131. And any arrangement which will have the effect of withdrawing the capital and turning it over to the stockholders, except in the manner provided by law, is in violation of this provision forbidding the trustees to "divide, withdraw, etc." and is void as to any creditor of the corporation, either prior or subsequent, who had notice of the arrangement at the time of giving the credit.—*Martin v. Zellerbach*, 38 Cal. 300. The prohibition is directed against the trustees and is designed to protect creditors as such and also to protect the stockholders against their mismanagement in distributing

capital stock in the form of dividends.—*Id.*

**CORPORATION INDEBTED:** The directors of a mining corporation which has become indebted by acquiring its property encumbered with debt and by making permanent improvements thereon are not liable to the corporation merely because they declare and pay dividends out of the net proceeds of the mine without first paying the whole of such debts and are not thereby guilty of an infraction of this section prohibiting the making of dividends except from the surplus profits arising from the business of the corporation.—*Excelsior Water & Min. Co. v. Pierce*, 27 Pac. 44, 90 Cal. 131. Also where it appears that the corporation had used surplus profits equal in amount to the dividends paid for the purpose of making needed improvements, there is no violation of the section.—*Id.*

### **Section 2107. Directors, How Removed from Office:**

No director can be removed from office unless by a vote of the stockholders holding two-thirds of the capital stock, or of two-thirds of the members, where there is no capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal. Meetings of stockholders or members for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one-half of the votes. Such calls must be in writing and addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. If the secretary refuses to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting.

The notice must be given in the manner provided in section 2098 of this Title, unless other express provision has been made therefor in the by-laws. In case of removal the vacancy may be filled by election at the same meeting.

1887 R. S. Sec. 2597

**Section 2108. Justice of the Peace May Order Meeting, When:** Whenever from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any justice of the peace of the county where such corporation is established, may on written application of three or more of the stockholders, or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the justice may, in the same warrant, direct such person to preside at such meeting until a secretary is chosen and qualified, if there is no officer present legally authorized to preside thereat.

1887 R. S. Sec. 2598.

**Section 2109. Majority of Stock Must be Represented:** At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock, or of the members, when there is no capital stock, represented either in person, or by proxy, in writing. Every person acting therein in person, or by proxy, or by representative, must be a member thereof, or a bona fide stockholder, having stock in his own name on the stock-books of the corporation, at least ten days prior to the election. Any vote or election had otherwise than in accordance with the provisions of this Title, is voidable at the instance of absent stockholders or members and may be set aside by petition to the district court at his chambers. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election or majority vote had. Such adjournment and reasons therefor being recorded in the journal of proceedings of the board of directors.

1887 R. S. Sec. 2599.

**WHO MAY VOTE:** A person to whom stock has been issued as a trustee without the knowledge or consent of the owners, is not a bona fide stockholder within the meaning of the section, and where without stock thus issued a majority of the stock is not represented, at a meeting for the election of trustees, the election is void.—*Stewart v. Mahoney Min. Co.* 54 Cal. 149. The real owner of stock in such corporations is entitled to represent it at the meeting of the corporation, and the mere fact that he does not appear as the owner on the books of the company should not absolutely exclude him from the privilege of so doing.—*People v. Hill*, 16 Cal. 114. Fraudulent representations made by a stockholder as to the corporation's future action, by which a person is induced to subscribe to its stock, cannot give such person a right to control that stockholder's vote for the purpose of determining the future action of the corporation.—*Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521, 21 N. E. 878. So a pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting

of the directors and the pledgor has not, but equity may compel the pledgee in a proper case, to give him a proxy.—*In re Argus Printing Co.* 1 N. D. 434, 12 L. R. A. 781, 48 N. W. 347. The denial of his right to vote will not justify one who has a majority of the stock of a corporation in withdrawing from a meeting and organizing another meeting and voting there, but his vote at the original meeting would have been effective notwithstanding the rejection.—*Id.*

**ADJOURNMENT:** Under a similar statute, it has been held that adjournment is here provided for, but the president of a corporation cannot adjourn a stockholder's meeting sine die against the will of stockholders.—*State v. Cronan (Nev.)*, 49 Pac. 41.

**PROXIES:** Under the section providing that the stockholders may be represented by proxies at all corporate elections, a stockholder may choose any person to cast his vote, and the by-law providing that no proxy shall be voted by one not a stockholder is unreasonable and invalid.—*Peoples' Home Sav. Bank v. Sup. Court*, 104 Cal. 649, 38 Pac. 452.

**Section 2110. Stock of Minor, Etc., How Represented:** The shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator.

1887 R. S. Sec. 2600.

**EXECUTORS:** Stock held by executors cannot be voted when they disagree as to the way in which the vote shall be cast.—*Tunis v. Hestonville M. F. Pass. R. Co.* 149 Pa. 70, 15 L. R. A. 665, 24 Atl. 88. The right to vote stock

held by executors in trust under a will is not affected by a codicil directing that it shall be voted as one executor shall direct, and that the other executor shall give him a proxy where no proxy has in fact been given and no legal proceedings taken to enforce this



provision.—Id. Under this section, an executor may vote stock without a formal transfer thereof to him.—Mar- ket St. Ry. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225.

**Section 2111. Postponed Election:** If from any cause an election does not take place on the day appointed in the by-laws, it may be held on any day thereafter, as may be provided for in such by-laws, or to which such election may be adjourned or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered, a meeting may be called by the stockholders, as provided in section 2107 of this title.

1887 R. S. Sec. 2601.

**Section 2112. Complaints and Proceedings Regarding Elections:** Upon the application of any person, or body corporate, aggrieved by any election held by any corporate body, or any proceedings relating to any such election, the district judge of the district in which such election is held, must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. Before the proceedings are had under this section, five days' notice thereof must be given to the adverse party, or to those to be affected thereby, if found within the state.

1887 R. S. Sec. 2602.

**POWER OF EQUITY:** Held, under similar section that a court of equity has jurisdiction to review a corporate election to oust officers illegally elected.—Whitehead v. Sweet (Cal.), 58 Pac. 376.

**"ELECTION" AND "SELECTION:"** Under a similar section in California, the words, "Any election held by a corporate body," apply only to an elec-

tion by the stockholders and not to a selection by the board of directors of a person to fill a vacancy in the board where the statutes provide that the directors shall be elected annually by the stockholders, and also provide for filling a vacancy by an appointee of the board. (See Sec. 2102).—Wickersham v. Brittain, 93 Cal. 34, 15 L. R. A. 106, 28 Pac. 7792, 29 Pac 51.

**Section 2113. Liability of Officers for False Certificates and Reports:** Any officer of a corporation, who willfully gives a certificate, or willfully makes an official report, public notice, or entry in any of the records of books of the corporation, concerning the corporation or its business, which is false in any material representation, is liable for all the damages resulting therefrom to any person injured thereby; and if two or more officers unite or participate in the commission of any of the acts herein designated, they are jointly and severally so liable.

1887 R. S. Sec. 2603.

**NOTICE, WHAT TO CONTAIN:** Under this section, it is not required that notice of a special meeting of the directors of a corporation should spe-

cify the purpose of the meeting. A notice that the meeting was held, the place where and the time when it was held, will be sufficient.—Granger v. Original Empire M. & N. Co. 59 Cal. 678.

**Section 2114. Meetings by Consent:** When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if at a meeting legally called and notified.



1887 R. S. Sec. 2604.

**RATIFICATION:** The failure to give notice of a meeting at which corporate bonds and mortgage are authorized, is immaterial when all per-

sons having any beneficial interest in the corporation as stockholders have ratified the action, with full knowledge of the facts.—*Nelson v. Hubbard* (Ala.), 17 L. R. A. 375, 11 So. 428.

**Section 2115. Proceedings of Meetings by Consent:**

The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

1887 R. S. Sec. 2605.

**Section 2116. Meetings, Where Held:** The meetings of the stockholders, members and board of directors of a corporation must be held at his office, or principal place of business.

1887 R. S. Sec. 2606.

**Section 2117. When no Provision, Meetings How Called:** When no provision is made in the by-laws for regular meetings of the directors, and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given by the secretary to each director, if within the state, on the order of the president, or if there be none, on the order of two directors.

1887 R. S. Sec. 2607.

**Section 2118. Change of Principal Place of Business:** Every corporation that has been or may be created under the general laws of this state or of the Territory of Idaho may change its principle place of business from one place to another within this state. Before such change is made, the consent, in writing, of the holders, of two-thirds of the capital stock, or of two-thirds of the members, when there is no capital stock, must be obtained and filed, and notice of such intended removal or change must be published, at least once a week, for three successive weeks, as provided in section 2098, giving the name of the county where it is situated, and that to which it is intended to remove.

1887 R. S. Sec. 2608.

**Section 2119. Liability of Stockholders:** Each stockholder of a corporation is individually and personally liable for its debts and liabilities to the full amount unpaid upon the par or face value of the stock of shares owned by him. Any creditor of the corporation may institute actions against any of its stockholders jointly or severally, and in such action the court must determine the amount unpaid upon the stock held or owned by each defendant, and a several judgment must be entered against him for a sum not exceeding such amount and nothing in this title must be construed to render any stockholder individually or personally liable, as such stockholder, for debts or liabilities of the corporation, either at the suit of a creditor or for assessments or calls, to an amount exceeding the balance unpaid upon its stock, or the difference between the amount that has been actually paid upon his stock and the par or face value thereof,

except when so liable on the ground of fraud or misrepresentation, or, concealment, or for neglect or misconduct as an officer, agent, stockholder, or member of the corporation; and no corporation shall issue any stock as paid up, or in whole or in part, or credit any amount, assessment or call as paid upon any of its stock, except for money, property, labor or services actually received by the corporation, or actually paid upon the indebtedness of the corporation as provided in this section, to the full value of the amount credited upon such stock. If any stockholder of an insolvent corporation pays the full amount unpaid upon the stock held by him, as above defined, upon the overdue debts of the corporation, incurred while he was such stockholder, he is relieved from any further personal liability upon his stock, but not from lectany liability for fraud, neglect or misconduct. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred by the corporation; and such liability is not released or discharged by any subsequent transfer of stock. When such liability does not arise upon contract it shall be deemed to be incurred when judgment therefor is obtained against the corporation. The term stockholder, as used in this section applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and, also, to every person who has advanced the installments or purchase money, or subscribed for stock, in the name of a minor, so long as the latter remains a minor and also to every guardian or trustee who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian or trustee are not liable under the provisions of this section, by reason of any such investment; nor is the person for whose benefit such investment is made responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period, or while the investment continues. Stock held as collateral security, or by a trustee who is not the beneficial owner, or in any other representative capacity without a beneficial interest, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with the debts or liabilities of the corporation, but the pledgor, or person, or estate represented is to be deemed the stockholder, as respects such liability. Members of corporations not organized for profit and having no capital stock are not individually or personally liable for its debts or liabilities, unless such liability is imposed by the by-laws of the corporation and then only to the extent so imposed; any such liability may be enforced, to the extent imposed by the by-laws, by joint or several actions against members, as before provided. The liability of each stockholder of a corporation not formed under the laws of this state, but doing business within the state, is the same as the liability of stockholders of corporations organized under the laws of this state.

1887 R. S. Sec. 2609, amended 1899, 5th  
Ses. p. 115; 1891, 1st Ses. p. 172.

APPLICATION OF THE SECTION:

The provisions of this section apply only to the personal liabilities of stockholders, and do not apply to the liabil-



ity of stock to assessment.—*Hall v. Eagle Rock & Willow Creek Water Co.* (Idaho), 51 Pac. 110.

**WHAT LIABLE FOR:** The section provides that the liability of each stockholder is determined by the amount of stock owned by him at the time the debt was incurred, and the stockholder is not liable on a note given by the corporation in payment of an antecedent debt, but on the original debt.—*Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077. As the liability of a stockholder in a corporation is primary in the sense that he is not a surety, he cannot defend an action against him made by a creditor of the corporation on the ground that the corporation had given a mortgage to secure the debt, and that this is unforeclosed.—*Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. So the payment of debts of a corporation incurred prior to the time when the stockholder acquired his stock, is not voluntary and cannot be recovered of one who sold him the stock.—*Danielson v. Yoakum*, 116 Cal. 382, 48 Pac. 322. The following instrument in writing was issued to the president and manager of a corporation: "Montpelier, Idaho, Apr. 29. 1884. Be it known by these presents: That I, as manager and president of this institution, do agree to refund to Jacob Jones the sum of \$926.80 at one year's notice from the date of said notice. It is the understanding that this money shall draw what interest it makes in proportion to all the shares of the institution. (Signed) H. S. Wooley." Held, that it was the obligation of the corporation and that an action could be maintained thereon by the payee named therein against the stockholders under this section.—*Jones v. Wooley*, 2 Idaho, 790, 26 Pac. 120.

**ENFORCEMENT:** Where a statute creates a liability against the stockholders of a corporation and prescribes a remedy for its enforcement, that remedy is exclusive.—*Russell v. Pac. Ry. Co.* 113 Cal. 258, 45 Pac. 323. In an action under this section for certain corporate indebtedness to plaintiff, one of the defendants made default and judgment was entered for the amount of his several liability. The motion of the plaintiff to try such action against the other defendants who had answered was denied on the ground that since trial and judgment as to the defendant in default, the court had no further jurisdiction of the case, but held, that mandamus was properly awarded to compel the justice to proceed to such trial.—*Grimwood v. Barry* (Cal.), 50 Pac. 430.

**WHAT LAW GOVERNS:** A similar liability of stockholders under the

Kansas statutes held to be one of contract and not penal, and an action to enforce it may be maintained in another state under the clause "The plaintiff in an execution may proceed by action to charge stockholders with the amount of the judgment," said state having jurisdiction of the stockholder after first obtaining judgment against the corporation and based upon the judgment and return of execution in Kansas.—*Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023. But the liability of a stockholder of a corporation created by statute of one state on its becoming insolvent, cannot be enforced in another state.—*Russell v. Pac. R. Co.* 113 Cal. 258, 45 Pac. 323.

**FRAUD:** A stockholder may show that the corporate indebtedness which is sought to be enforced against her was incurred through fraud and collusion of the directors.—*National Carriage Man. Co. v. Story & Isham Comm. Co.* 111 Cal. 531, 44 Pac. 157.

**STOCKHOLDERS AS CREDITORS:** A creditor, though a stockholder, can enforce the liability of the other stockholders for their proportion of his debt, and that right passes to his assignee.—*Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Smith v. Londoner*, 5 Colo. 365. And where a stockholder against whom proceedings are had to enforce payment of his stock liability, is himself a creditor of the insolvent corporation, he will be allowed in equity to plead the indebtedness of the corporation to himself as a set-off against his liability to the other creditors.—*Musgrave v. Glen Elder Farmers' etc. Ass'n.* (Kan.), 49 Pac. 338.

**WHO LIABLE:** A signer of an agreement to purchase stock in the future was not liable as a stockholder where the agreement was not acted upon, no stock issued or assessment made thereon in the signer's name and the signer's name did not appear on the stock ledger.—*United States Wind Engine & Pump Co. v. Davis* (Kan.), 42 Pac. 590.

**TRANSFER TO AVOID LIABILITY** A stockholder of a corporation to whom has been assigned all of its assets in consideration of her agreement to pay its debts and who knows that the corporation is insolvent cannot relieve herself of personal liability for the corporate indebtedness by assigning her stock to an insolvent person for that purpose.—*National Carriage Man. Co. v. Story & Isham Comm. Co.* 111 Cal. 531, 44 Pac. 157. But where a stockholder makes a regular transfer in good faith to solvent persons prior to the time the claims of creditors attach, and such transfer is valid and relieves the original stockholder from



liability, although the transferee may have become insolvent before the commencement of the action to charge the original stockholder.—*Merrill v. Meade* (Kan.), 49 Pac. 787.

**CONSIDERATION PAID FOR STOCK:** A stockholder who pays for stock with worthless property will be liable to the corporation as on an unpaid subscription.—*Salt Lake Hardware Co. v. Tintic Mill. Co.* (Utah), 45 Pac. 200. But where all the stock of the corporation is in payment for property and franchises honestly believed by the parties to be the par value of the stock and subsequent creditors of the corporation with knowledge that the stock was so issued cannot hold the stockholders liable on the ground of an over valuation of the property.—*Turner v. Bailey* (Wash.), 42 Pac. 115, but where stockholders bought stock of the corporation for a certain amount and paid for it, and never agreed to pay any balance between the price paid and the par value, the creditors should fail as against such stockholders in an action to enforce liability of subscribers.—*Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

**AGREEMENT TO AVOID LIABILITY:** The stockholders of a banking corporation whose charter, verified certificate and advertisements proclaimed its capital stock to be \$50,000, and whose verified statements recite that

only \$10,000 had been paid in on said stock, cannot, without changing its charter, verified certificates, advertisements or verified statements, relieve themselves of their liability to the creditors of the corporation by any agreement among themselves, whether the creditors were such before or after such agreement.—*Putnam v. Hutchison* (Kan.), 45 Pac. 931.

**WHAT LAW GOVERNS:** The stockholders of a banking corporation, which becomes insolvent prior to the amendment of March 11, 1891, (re-enacted in its present form, 5th Ses. page 115) could not come within its provisions as to their liability to the creditors of the bank. Their liability is governed by the provisions of this section.—*Aulbach v. Dahler* (Idaho), 43 Pac. 322.

**ACTION AGAINST STOCKHOLDERS:** Under the act concerning corporations, stockholders are individually and personally liable for their portion of all indebtedness incurred in conducting the business of the corporation, and a joint and several action may be instituted for the collection of the same.—*Sparks v. Lower Payette Ditch Co.* 2 Idaho, 1030, 29 Pac. 134.

**INTEREST:** Stockholders liable for debts of a corporation are liable for the interest thereon.—*Wells, Fargo & Co. v. Enright* (Cal.), 60 Pac. 439.

**Section 2120. Use of Word "Limited":** All corporations doing business in this state, whether organized under the laws of this state, or some other state, desiring to avail themselves of the provisions of the preceding section, shall cause to be written or printed after the corporate name, on its stock certificates, letter and bill heads, and all its official documents the word "limited;" also, after the corporate signature to all official or public documents the word "limited."

1899, 5th Ses. p. 116, Sec. 2; 1891, 1st Ses. p. 174.

**Section 2121. Certificates of Stock, Issue of:** All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

1887 R. S. Sec. 2610.

The issuance of stock is not a necessary preliminary to the ownership or assessability of such stock.—*Pacific Trust Co. v. Coon*, 107 Cal. 477, 40 Pac. 542.

**REFUSAL TO DELIVER:** An action for damages will lie against a corporation for refusal to deliver a certificate of stock bought from it and paid for and to transfer the same on the books.—*Salt River Canal Co. v. Hickey* (Ariz.), 36 Pac. 171.

**Section 2122. Stock is Personal Property; Transfer:** 2122 Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are

personal property, and may be transferred by endorsement by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the name of the parties by and to whom transferred, the number and designation of the shares, and the date of the entry. Corporations may, by by-laws, provide that no transfer of its stock shall be made upon its books until all indebtedness to the corporation of the person in whose name the stock stands, whether for assessments, calls, or otherwise is paid.

1887 R. S. Sec. 2611.

Stock and transfer book, Sec. 2151.

**BOOKS AS EVIDENCE:** The books of a corporation contain the only proper evidence to show the transfer of stock between parties to such transfer, in a suit by creditors of the corporation, and evidence of the parties to the transfer cannot be received.—Aulbach v. Dahler (Idaho), 43 Pac. 322.

**TRANSFER WITHOUT REGISTRATION:** A transfer on the books is not necessary to give a donee or purchaser an equitable title to the shares. Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775. Likewise, an entry on the books of a corporation is not necessary to vest a vendee of shares with all the title the vendor had, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration.—Parker v. Bethel Hotel Co. 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209.

**DUPLICATE CERTIFICATES:** The issue of duplicate certificates, reciting that they are such and that they are issued in lieu of lost ones, may be compelled upon tender of a sufficient indemnity bond.—Keller v. Eureka Brick Machine Mfg. Co. (Mo.), 11 L. R. A. 472.

**NEGOTIABILITY:** A certificate of stock is not a negotiable instrument within the definition of the Cal. Code.—Barstow v. Savage Mining Co. 64 Cal. 388, 1 Pac. 349. It is a mere evidence of the holder's title to a given share in the property and franchises of the cor-

poration.—Sherwood v. Meadow Valley M. Co. 50 Cal. 412.

**MANDAMUS IMPROPER REMEDY:** A party entitled to stock in a private corporation has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company's books, and mandamus will not lie to compel transfer.—Kimball v. Union Water Co. 44 Cal. 173. Refusal without right by a corporation to register a transfer of its stock on the books, constitutes a conversion of the stock.—Ralston v. Bank of Cal. 112 Cal. 208, 44 Pac. 476.

**ASSIGNMENT:** Under a similar section, held that title to stock transferred by endorsement but not yet entered on the books, does not pass by a general assignment as against creditors of the assignor without such transfer on the books.—Lyndonville Nat. Bank v. Folsom, 7 N. M. 611, 38 Pac. 253. An assignment of corporate stock after the levy of an assessment on the same will not relieve the assignor from liability on the assessment, where no formal transfer was made on the books.—Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 45 Pac. 10.

**PLEDGE:** The pledgee of corporate stock, the contract of pledge being silent on the subject, has not the right by virtue of the pledge, before the maturity of the debt, to have the stock transferred on the books into his name.—Spreckles v. Nevada Bank of San Francisco, 113 Cal. 272, 45 Pac. 329.

### **Section 2123. Shares Held by Married Women:**

Shares of stock in corporations, held or owned by a married woman, may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a femme sole. All dividends payable upon any shares of stock of a corporation held by a married woman, may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman touching any shares of stock of any corporation, owned by her, is as



valid and binding without the signature of her husband, as if she were unmarried.

1887 R. S. Sec. 2612.

**DURESS:** The transfer of stock by a married woman, although procured by duress and coercion on the part of her husband, is good, under the statutes of

Idaho, where the transferee is a bona fide holder for value without notice or knowledge of such duress or coercion.—*Bryan v. Montandon* (Idaho), 55 Pac. 650.

### **Section 2124. Shares of Non-Residents, Transfer of:**

When shares of stock in a corporation are owned by a non-resident of the state, the president, secretary or directors of the corporation, before entering any transfer of the shares on its books, or issuing certificate therefor to the transferee, may require satisfactory evidence that the non-resident owner was alive at the date of the transfer, and if such satisfactory evidence be not furnished, may require a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or approved by the judge of the district court of the district in which the principal office of the corporation is situate, conditioned to protect the corporation against any liability to the heirs or legal representatives of the owner of the shares, in case of his death before the transfer; and if such evidence or bond be not furnished when required, as herein provided, neither the corporation nor any officer thereof is liable for refusing to enter the transfer on the books of the corporation.

1887 R. S. Sec. 2613.

### **Section 2125. Assessments, When May be Levied:**

The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent herein provided.

1887 R. S. Sec. 2614.

**PURPOSES:** The payment by the corporation of an assessment for the construction of a tunnel run for the purpose of working the mines of another company of which the corporation was a stockholder, is an investment of capital and not a current expense.—*Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44. An assessment to pay for the repair of an engine and other machinery necessary in conducting the business of the corporation, held valid.—*Younglove v. Steinman* (Cal.), 22 Pac. 189. The necessity for a call on stock cannot be questioned by the stockholders, it is for the directors to determine.—*Budd v. Multnomah Street Railway Co. (Or.)*, 15 Pac. 659.

**PAID-UP STOCK:** Where the articles of incorporation of a water company provide for an assessment of paid-up stock when authorized by a three-fourths vote of all the stockholders, it is proper and legal for such assessments to be made and collection enforced.—*Hall v. Eagle Rock & Willow Creek Water Co. (Idaho)*, 51 Pac.

110. A corporation may assess and collect assessments on stock which has been fully paid up.—*Sparks v. Lower Payette Ditch Co.* 2 Idaho, 1030, 29 Pac. 134. Stock set apart by the articles of association as a fund from which to derive a working capital is "exhausted" when the directors are unable to sell it, within the meaning of a provision in the articles prohibiting the directors from levying an assessment on the sold stock until the reserved stock has been "exhausted," and hence the directors may assess the sold stock in an amount not exceeding 10 per cent. of its par value, though it has been fully paid up under Comp. Laws, Secs. 2374, 2375 (identical with our Secs. 2125, 2126) expressly giving them authority to levy such an assessment on paid up stock for working expenses.—*Gary v. York Mining Co. (Utah)*, 35 Pac. 494. Under similar provisions, held, that corporations formed and existing under laws of the state may levy and collect assessments for corporate purposes on shares of stock upon which the subscriptions have been fully paid.—*Santa Cruz R. R. Co.*



v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Green v. Abietine Medical Co. 96 Cal. 322, 31 Pac. 100.

**WHEN LEVIED:** In the absence of any provision therefor, a corporation cannot levy an assessment on its capital stock until after the whole amount has been subscribed.—San Bernardino Inv. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487.

**WHO LIABLE:** A mere agreement to "subscribe and take," the amount of capital stock set opposite the subscriber's name does not bind him to pay an assessment levied before one-fourth

of the capital stock has been subscribed in violation of this section.—Ventura & O. V. Ry Co. v. Hartman, 116 Cal. 260, 48 Pac. 65.

**TRANSFER OF STOCK:** An assignment of corporate stock after the levy of an assessment on the same will not relieve the assignor from liability on the assessment, where no formal transfer was made on the books.—Visalia & T. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10. But after a transfer of the stock has been duly made on the books of the company, the transferee becomes liable on assessments.—Id.

**Section 2126. Limitation of Assessments:** No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided as follows:

First. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount;

Second. The directors of railroad corporations may assess the capital stock in installments of not more than ten per centum per month, unless in the articles of incorporation it is otherwise provided;

Third. The directors of fire insurance corporations may assess such a percentage of the capital stock as they deem proper.

1887 R. S. Sec. 2615.

See notes under previous section.

**Section 2127. Limit to Number of Assessments:** No assessment must be levied while any portion of a previous one remains unpaid, unless:

First. The power of the corporation has been exercised in accordance with the provisions of this title for the purpose of collecting such previous assessment;

Second: The collection of the previous assessment has been enjoined;

Third. The assessment falls within the provisions of one of the subdivisions of the last preceding section.

1887 R. S. Sec. 2616.

**Section 2128. Assessment, How Levied, Order for:** The order levying an assessment must specify the amount thereof, when, to whom and where payable; fix the day subsequent to the full term of publication of the assessment notice, on which the unpaid assessments will be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

1887 R. S. Sec. 2617.

**PURPOSE OF LEVY:** The levy of an assessment on mining stock to pay a debt which the company does not owe is not of itself fraud, so as to in-

validate a sale made thereunder, when it is not shown that the money was not used for such purpose.—Johnson v. Kirby (Cal.), 4 Pac. 458,

**Section 2129. Notice of Assessment:** Upon the making of the order the secretary must cause to be published a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business). Notice is hereby given that at a meeting of the directors held on the (date) an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment remains unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the (day appointed) to pay the delinquent assessment, together with costs of advertising and expenses of sale. (Signature of secretary with location of office).

1887 R. S. Sec. 2618.

A finding that a meeting of directors was duly and regularly convened and that an assessment made thereat was,

"lawfully and rightfully" levied, includes a finding that the necessary notice was given.—*Younglove v. Steinman* (Cal.), 22 Pac. 189.

**Section 2130. Publication of Notice:** The notice must be published once a week, for four consecutive weeks, in some newspaper of general circulation published at the place designated in the articles of incorporation as the principal place of business, and also in some newspaper published in the county in which the works of the corporation are situated, if situated in a different county and a paper be published therein. If there be no newspaper published in the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published at the capital of the state.

1887 R. S. Sec. 2619.

**Section 2131. Publication of Delinquent Notice, Form of:** If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice heretofore provided for has been published, a notice substantially in the following form:

(Name in full. Location of principal place of business). Notice:—There is delinquent upon the following described stock on account of assessment levied on the (date), (and assessments previous thereto, if any), the several amounts set opposite the names of the respective shareholders as follows: (names, number of certificate, number of shares, amount). And in accordance with law, so many shares of each parcel of such stock as may be necessary, will be sold at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale. (Name of secretary, with location of office).

1887 R. S. Sec. 2620.

**Section 2132. Further Requisites of Notice:** The notice must specify every certificate of stock, the number of shares it



represents and the amount due thereon, except when certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon must be stated.

1887 R. S. Sec. 2621.

**Section 2133. Time of Publication:** The notice, when published in a daily paper, must be published for ten days, excluding Sundays and legal holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

1887 R. S. Sec. 2622.

**Section 2134. Effect of Publication; Jurisdiction:** By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale, upon which any portion of the assessment or cost of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessment due and cost of advertising and sale.

1887 R. S. Sec. 2623.

**Section 2135. Sale, How Conducted:** On the day, at the place, and at the time appointed in the notice of sale, the secretary must, unless otherwise ordered by the board of directors, sell, or cause to be sold at public auction to the highest bidder, for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising in addition to the assessment.

1887 R. S. Sec. 2624.

**VALIDITY OF SALE:** The levy of an assessment on mining stock to pay a debt which the company does not owe, is not of itself a fraud, so as to invalidate a sale made thereunder, where it is not shown that the money was used for such purpose.—*Johnson v. Kirby* (Cal.), 4 Pac. 458.

Where the articles of incorporation

of water company provide for an assessment of paid up stock when authorized by a three-fourths vote of all the stockholders, it is proper and legal for such assessments to be made and the collection thereof enforced by the sale of the stock.—*Hall v. Eagle Rock & Willow Creek Water Co.* (Idaho), 51 Pac. 110.

**Section 2136. Transfer to Purchaser:** The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of shares, is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation on payment of the assessments and costs.

1887 R. S. Sec. 2625.

**Section 2137. When Corporation May Purchase:** If at the sale of stock, no bidder offers the amount of the assessment and costs and charges due, the same may be bid in and purchased by the corporation through the secretary, president or any director thereof, at the amount of the assessment, charges and costs due; and said amount must be credited as paid in full on the books of the corporation,

and entry of the transfer of the stock to the corporation made. While the stock remains the property of the corporation it is not assessable, nor must any dividend be declared thereon, but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation.

1887 R. S. Sec. 2626.

**REPUDIATION OF PURCHASE:** Where a corporation sold some of its stock for the non-payment of an assessment and bid the same in, in which the stockholder acquiesced, it cannot

of its own motion, treat the sale as invalid and reinstate the stockholder so as to render him liable for the assessment.—*Patterson v. Brown & Campion Ditch Co.* (Colo.), 34 Pac. 769.

**Section 2138. Stock Purchased by the Corporation: Sale of, Cannot be Voted at Elections:** All purchases of its own stock made by any corporation, vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws, on vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation, it shall not be voted upon, but a majority of the remaining shares is a majority of the stock for all purposes of election or voting.

1887 R. S. Sec. 2627.

**Section 2139. Postponement of Payment of Assessment or Sale:** The dates fixed in any notice of assessment or notice of delinquent sale, published as aforesaid, may be extended from time to time for not more than thirty days by order of the directors, entered on the records of the corporation; but no such order is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.

1887 R. S. Sec. 2628.

**Section 2140. Error in Proceedings, Effect of:** No assessment is invalidated by a failure to make publication of the notices, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings except the levying of assessment, are void, and publication must begin anew.

1887 R. S. Sec. 2629.

**Section 2141. Action to Recover Stock Sold, Prerequisites:** No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment; irregularity or defect in the notice of sale or in its publication; or defect or irregularity in the sale; unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid or may be due thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced within six months after such sale was made.

1887 R. S. Sec. 2630.



**Section 2142. Proof of Publication and Sale:** The publication of notice required by this Chapter may be proved by the affidavit of the printer, publisher, foreman or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom, and for what price, and of the fact of the purchase money being paid. Such affidavit must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates of files and records of the corporation in its office, signed by the secretary and under seal of the corporation, are prima facie evidence of their contents.

1887 R. S. Sec. 2631.

**Section 2143. Waiver of Sale. Action for Assessment:** On the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale, the board of directors may elect to waive further proceedings by sale, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.

1887 R. S. Sec. 2632.

**EVIDENCE OF WAIVER:** A resolution by a board of directors "that the president and secretary are hereby ordered to commence suit for the collection of assessment," on stock, sufficiently shows a waiver of further proceedings under the chapter for the collection of delinquent assessments.—*San Gabriel Valley Land & Water Co. v. Dennis* (Cal.), 34 Pac. 441.

**REPUDIATION:** Where a corporation sold some of its stock for the non-payment of assessments and bid the same in, in which the stockholder acquiesced, it cannot of its own motion treat the sale as invalid and reinstate the stockholder so as to render him liable for the assessment.—*Patterson v. Brown & Campion Ditch Co. (Colo.)*, 34 Pac. 769.

**Section 2144. Powers of Corporations:** Every corporation, as such, has power :

First. Of succession, by its corporate name, for the period limited; and when no period is limited, perpetually;

Second. To sue and be sued, in any court, as a natural person may;

Third. To make and use a common seal, and alter the same at pleasure;

Fourth. To purchase, hold and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited by this Title;

Fifth. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation;

Sixth. To make by-laws not inconsistent with any existing law, for the management of its business and property, the regulation of its affairs, and for the transfer of its stock;

Seventh. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments;

Eighth. To enter into any contracts or obligations essential, necessary or proper to the transaction of its ordinary affairs, or for the purposes of the corporation.

1887 R. S. Sec. 2633.

**BY-LAWS:** A by-law asserting that stockholders are not held to their constitutional liability is void, since corporations may make only such by-laws as are consistent with the laws and constitution of the state.—*Wells v. Black*, 117 Cal. 157, 48 Pac. 1090. See further as to by-laws under sections 2098, 2099, 2100.

**CONTRACTS:** The doctrine of ultra vires will not be applied when it would defeat the ends of justice.—*Burke Land & Live-Stock Co. v. Wells, Fargo & Co.* (Idaho), 60 Pac. 87. Yet it is held that a person dealing with a corporation is charged with notice of its powers and that where a corporation enters into a contract which it has no power to make, the contract is void as to creditors, although assented to by all the stockholders of the company.—*Washington Mill Co. v. Sprague Lumber Co.* (Wash.), 52 Pac. 1067. A corporation to mine, smelt, refine and operate in mining property has not the power to purchase a chose in action.—*Salmon River Mining & Smelting Co. v. Dunn*, 2 Idaho, 30, 3 Pac. 911. Where stockholders of a corporation obtain money for it, giving their individual note, the corporation agreeing to protect them from the payment of said note, the corporation paying a portion of said note and the balance being paid by individuals; held, that the corporation was liable to the parties so paying for the amount paid by them and the cause of action accrued at the time said payments were made.—*Frantz v. Idaho Artesian Well & Drilling Co.* (Idaho), 46 Pac. 1026. So a corporation is bound by a contract made by its promoters, the benefits of which were accepted by the corporation.—*Wall v. Niagara Mining & Smelting Co. of Idaho* (Utah), 59 Pac. 399. That two corporations have directors in common does not, in the absence of fraud, invalidate contracts made between them.—*Salina Nat. Bank v. Prescott* (Kan.), 57 Pac. 121. So a sale between corporations is not void merely because both had the same directors.—*Smith v. Ferris & C. H. Ry. Co.* (Cal.), 51 Pac. 710.

**SUING AND BEING SUED:** A corporation in bringing suit need not allege its incorporation, and its legal capacity to sue will be presumed until the contrary appears.—*Leader Printing Co. v. Lowry* (Okl.), 59 Pac. 242. Stockholders cannot sue or defend legal proceedings in the corporate name without showing that the directors are willfully or fraudulently neglecting their interests.—*Home Mining Co. v. McKibben* (Kan.), 56 Pac. 756.

**SEALS:** Where a seal which had not been formally adopted by a corporation was used for the first time in the execution of instruments afterwards in question, the finding that it had become the common seal of the corporation by use, is sustained by a showing that it had afterward been employed as the seal of the corporation in all transactions requiring the impressment of a seal.—*Blood v. La Serena Land & Water Co.* 113 Cal. 221, 45 Pac. 252. A mortgage executed on behalf of a corporation by a duly authorized agent is not void because sealed with a scroll instead of the corporate seal.—*Thayer v. Nehalem Mill Co.* (Or.), 51 Pac. 202.

**HOLDING AND CONVEYING LAND:** Land which a corporation cannot hold in its own name, it cannot hold in the name of another, and when a corporation cannot hold the legal title to land, it cannot take a beneficial interest in it.—*Coleman v. S. R. T. R. Co.* 49 Cal. 517. So a bond to convey to a corporation land which the purposes of the corporation do not require is void.—*Id.* The fact that an alien owns stock in a corporation which has acquired title to real estate does not disturb the title of the corporation to the real estate, for the alien owns stock merely and shares of stock are personal property.—*Princeton Mining Co. v. First National Bank of Butte* (Mont.), 19 Pac. 210.

At common law, the directors of a corporation or the majority of the stockholders, where the corporation is a prosperous one, cannot transfer all the corporate property without the consent of all the stockholders.—*Forrester v. Boston & M. Consol. Copper & Silver Min. Co.* (Mont.), 55 Pac. 229.

**Section 2145. Cannot Emit Paper Money:** No corporation shall emit paper money or create or issue bills, notes or other evidences of debt, upon loans or otherwise, for circulation as money.

1887 R. S. Sec. 2634.

**Section 2146. Effect of Misnomer:** The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended.



1887 R. S. Sec. 2635.

A misnomer or variation from the precise name of a corporation in a deed of conveyance is not material if the identity of the corporation can be established from the face of the deed or from extrinsic evidence.—(Tenn.), 50 S. W. 759. Further still, it has been held

that where a corporation has entered into a contract by a wrong and very different name, yet the contract is binding where it appears that the corporation was intended.—North Point Consol. Min. Co. v. Utah & S. L. Canal Co. (Utah), 52 Pac. 168.

**Section 2147. When to Commence Business. Inquiry into Corporate Existence:** If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this Title, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the people of the state, on the information of the prosecuting attorney of the county of the principal place of business of the corporation.

1887 R. S. Sec. 2636.

**Section 2148. Increasing and Diminishing Capital Stock:** Every corporation may increase or diminish its capital stock in this section provided:

First. By a majority vote of the directors there may be called a meeting of the stockholders, to be convened for the purpose of increasing or diminishing the capital stock;

Second. Personal notice of the time and place of such meeting, and the object thereof must be served on each stockholder resident in this state; or, in lieu thereof, the notice must be published at least once a week in a newspaper published in the county where the principal place of business is located, for at least thirty days;

Third. The notice must also contain the amount to which it is proposed to increase or diminish the capital stock;

Fourth. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the works it may be the object or purpose of the corporation to construct;

Fifth. At least two-thirds of the entire capital stock must vote in favor of such increase or diminution before the same is effected;

Sixth. A certificate signed and verified by the chairman and secretary of the meeting, must be made, showing a strict compliance with all the requirements of this section, the amount to which the capital stock has been increased or diminished, the amount of stock represented at the meeting, the vote by which the object was accomplished;

Seventh. This certificate must be subscribed by a majority of the directors, and duplicates made, one to be filed in the office of the county recorder and one in the office of the secretary of state, as provided for original articles of incorporation, and thereupon the capital stock is so increased or diminished.

1887 R. S. Sec. 2637; Sub. "Second" changed and Sub. "Eighth" stricken out by Commission to conform to Constitutional limitation provided in Art. XI, Sec. 9.

**CONSTITUTIONAL PROVISIONS:** A constitutional provision declaring that all fictitious increase of stock shall be void and that no stock shall be issued except for money, labor done, or money or property actually received (c. f. Const. Idaho, Art. XI, Sec. 9), inhibits an increase of stock to represent an increased value of the property of a corporation in which the original capital was invested,—at least when there is no accumulated money surplus, or vis-

ible, tangible property in excess of the authorized stock which it is proposed to make the basis of the additional stock.—*Fitzpatrick v. Despatch Pub. Co.* 83 Ala. 604, 2 So. 727. But under a similar constitutional provision, an increase of stock of a corporation and the issuing of additional shares to be sold at a price less than the nominal par value of the stock to supply a fund actually required for the use of the corporation, was held not to be a fictitious increase of the stock.—*Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Mathias v. Pridham*, 1 Tex. Civ. Ap. 58, 20 S. W. 1015.

### **Section 2149. Amount of Real Property May Hold:**

No corporation must acquire or hold any more real property than may be reasonably necessary for the transaction of its business, or the construction of its works, except such right of way or other property as it may acquire under the laws of Congress, or as may be otherwise specially provided. A corporation may acquire real property, as provided in the Code of Civil Procedure, when needed for any of the uses and purposes there mentioned.

1887 R. S. Sec. 2638.

Acquiring real property: Code Civil Proc. Chap. CLXXIX.

**Section 2150. Corporations Must Keep Record:** All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present, and who absent, and, if requested by any director, member, or stockholder, the time must be noted when he entered the meeting or obtained leave or absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any director, member, or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation.

1887 R. S. Sec. 2639.

**RIGHT OF INSPECTION:** A stockholder of a corporation has, in the interest of such corporation, the right at reasonable times to inspect the cor-

porate books and records to inform himself as to how its affairs are conducted.—*State v. Pacific Brewing & Malting Co.* (Wash.), 58 Pac. 584.

**Section 2151. Stock and Transfer Book:** In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept a record of all stock the names of the stockholders or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale, or transfer of stock made, the date thereof, and by and to whom, and all such other records as the by-laws prescribe.



Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such Stock and Transfer Book must be kept open to the inspection of any stockholder, member, or creditor.

1887 R. S. Sec. 2640.

See notes under Section 2122.

**Section 2152. Power of Legislature Over Corporations:** The legislature may at any time amend or repeal this Title or any chapter, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

1887 R. S. Sec. 2641.

**Section 2153. Franchise May be Sold Under Execution:** For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property.

1887 R. S. Sec. 2642.

**Section 2154. Purchaser of Franchise May Conduct Business:** The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof and must thereafter conduct the business of such corporation, with all its powers, privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided.

1887 R. S. Sec. 2643.

**Section 2155. Purchaser May Sue in Name of Corporation:** The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had, is a bar to any subsequent action by or on behalf of the corporation for the same.

1887 R. S. Sec. 2644.

**Section 2156. Effect on Corporation of Sale of Franchise:** The corporation whose franchise is sold, as in this Chapter provided, in all other respects retains the same powers, is bound to discharge the same duties, and is liable to the same penalties and forfeitures as before such sale.

1887 R. S. Sec. 2645.

**Section 2157. Redemption of Franchise:** The corporation may, at any time within one year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent. interest thereon, but without any

allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof revert and belong to the corporation, as if no such sale had been made.

1887 R. S. Sec. 2646.

**Section 2158. Sale of Franchise, Where Made:** The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business.

1887 R. S. Sec. 2647.

**Section 2159. On Dissolution, Directors are Trustees:** Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders, or members of the corporation dissolved and have full power to settle the affairs of the corporation.

1887 R. S. Sec. 2648.

**Section 2160. May Extend Term of Existence:** Every corporation formed for a period less than fifty years may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension may be made at any meeting of the stockholders or members called by the directors expressly for considering the subject, if voted by stockholders representing two-thirds of the capital stock, or by two-thirds of the members; or may be made upon the written assent of that number of stockholders or members. A certificate of the proceedings of the meeting upon such vote, or upon such assent, must be signed by the chairman and secretary of the meeting and of a majority of the directors and be filed in the office of the county recorder, where the original articles of incorporation were filed, and a certified copy thereof in the office of the secretary of state, and thereupon the term of the corporation shall be extended for the specified period.

1887 R. S. Sec. 2649.

**Section 2161. Existing Corporations May Continue Under this Chapter:** Any existing corporation formed under any law of this State may continue under this Chapter, or under the provisions of any subsequent chapter particularly applicable thereto, by the unanimous vote of all its directors, or its election so to continue may be made at any annual meeting of the stockholders, or members or at any meeting called by the directors expressly for considering the subject, if voted by stockholders representing a majority of the capital stock, or by a majority of the members, or may be made by the directors upon the written consent of that number of such stockholders or members. A certificate of the action of the directors, signed by them and their secretary, when the election is made by their unanimous vote or upon the written consent of the stockholders or members, or a certificate of the proceedings of the meeting of the stockholders or members, when such election is made at any such meeting signed by the chairman and secretary of the meeting and a majority of the directors,



must be filed in the office of the recorder of the county where the original articles of incorporation are filed, and a certified copy thereof must be filed in the office of the secretary of state, and thereafter the corporation must continue its existence under the provisions of this Title which are applicable thereto, and must possess all the rights and powers, and be subject to all the obligations, restrictions and limitations prescribed thereby.

1887 R. S. Sec. 2650.

**WAIVER OF THE REQUIREMENT:** Where a corporation organized for the purpose of constructing a canal to be used for the distribution of water for irrigation purposes upon the lands of the stockholders has conducted its business for the period of eight years, made and collected assessments as provided for in the Code, which ac-

tion of the corporation has been recognized and acquiesced in by all of the stockholders, the corporations will be deemed to have adopted the provisions of Title 4, Civil Code (this title), although the filing of the certificate indicating its election so to do has not been made.—Hall v. Eagle Rock & Willow Creek Water Co. (Idaho), 51 Pac. 110.

**Section 2162. Designation of Agent<sup>a</sup> by Foreign Corporation:** Every corporation not created under the laws of this State, doing business in this State, must at the time of commencement to do business in this State, designate some person residing in the county in which the principal place of business of such corporation, in this State, is conducted upon whom process issued by authority of, or under any law of this State, may be served, and at the same time must file such designation in the office of the secretary of State, and in the office of the clerk of the district court for such county, and a copy of such designations certified by either of said officers must be evidence of such appointment; and it is lawful to serve on such person, so designated, any process issued as aforesaid, and such service must be deemed a valid service thereof.

Every such corporation which fails to comply with the provisions of this section shall be denied the benefit of the statutes of this State limiting the time of the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporation during such time as such person duly designated as aforesaid, upon whom such service can be made, shall be within the State.

*Provided, futher,* That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of this State applicable to like domestic corporations.

1887 R. S. Sec. 2653.

Eminent domain: Code Civil Proc. Chap. CLXXIX.

**"DOING BUSINESS:"** A single business transaction by a foreign corporation within the territory, is not "carrying on business" within the statute requiring a foreign corporation to file articles with the secretary of state and county recorder.—Babbitt v. Field (Ariz.), 52 Pac. 775; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137.

**SUMMONS:** On appeal from a judgment against a foreign corporation, who has not appeared in the action, the

judgment roll must contain evidence of the service of summons upon the person designated by such corporation upon whom summons is to be served under the provisions of this section, or else upon one of the agents or officers of such corporation mentioned in subsection 2, Section 4144 Rev. St. (Sec. 3194, Code Civil Proc.); and if such evidence of service of summons does not appear in the judgment roll, the judgment will be reversed on appeal.—Applington v. G. V. B. Min. Co. (Idaho), 55 Pac. 241.

**BEFORE FILING:** A foreign corporation filing its certificates and a copy of its charter as required by statute, may take under a trust deed executed before, but not delivered until after such compliance.—*Miller v. Williams* (Colo.), 59 Pac. 740.

**RIGHTS ACQUIRED UNDER THE SECTION:** By complying with the requirements of law as to the appointment of an agent upon whom process may be served, a foreign corporation doing business in Idaho acquires the same rights as, but no greater than, those of a citizen, so far as the venue of actions against it is concerned.—*Webster v. Oregon Short Line R. R. Co.* (Idaho), 55 Pac. 661. Under Rev. St., Section 2653 (this section), providing that a foreign corporation shall ap-

point some person resident in the county in which is its principal place of business to accept service for it, and granting to those complying therewith like privileges with similar domestic corporations, a defendant foreign insurance company, which has so complied, is entitled to a trial in the county where its principal place of business is located.—*Easley v. New Zealand Ins. Co.* (Idaho), 38 Pac. 405.

**SERVICE OF PROCESS:** When a foreign corporation has no resident attorney on whom a notice of appeal may be served, such notice may be served on the resident agent of such corporation on whom process may be legally served.—*Vermont Loan & Trust Co. v. McGregor* (Idaho), 51 Pac. 103.

## CHAPTER LXXXI.

### RAILROAD CORPORATIONS.

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#### Section.

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**Section 2163. Election of Directors:** Directors of railroad corporations may be elected at a meeting of the stockholders other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide; notice thereof to be given as provided for notices of meetings to adopt by-laws in Chapter LXXX of this Title.

1887 R. S. Sec. 2663.

Notice of meeting, Sec. 2098.

**Section 2164. May Borrow Money and Issue Bonds:** Railroad corporations may borrow, on the credit of the corporation, and under such regulations and restrictions as the directors thereof may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds



or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum, and may also issue bonds or promissory notes, of the same denomination and rate of interest, in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto. The amount of bonds or promissory notes issued for such purpose must not exceed, in all the amount of their capital stock and to secure the payment of such bonds or notes, they may mortgage their corporate property and franchise.

1887 R. S. Sec 2664.

**MODE OF EXECUTION:** Under a similar section held, that the section did not prescribe the mode of execution of such a mortgage, but the mode and manner of execution of mortgage of real and personal property by such corporations as that prescribed by the Civil Code for the execution of such mortgages in general, without exception in favor of any person or corporation.—*Bishop v. McKillican*, 124 Cal. 321, 57 Pac. 76.

**CONVEYANCE IN TRUST:** A conveyance in trust in the usual form held to be a mortgage within the meaning of a similar statute.—*McLane v. Placerville & S. Val. R. Co.* (Cal.), 6 Pac. 748.

**FORECLOSURE SALE:** Although a mortgage does not in terms authorize a sale for default in paying interest before the principal matures, the court may order a sale where necessary to the interest at stake.—*McLane v. Placerville & S. Val. R. Co.* supra.

cerville & S. Val. R. Co. supra.

**PRIORITY OF BONDS:** Where a railroad company, to induce a sale of its bonds, agrees with a purchaser that it will only issue bonds to the extent of \$10,000 for each mile of its road, and the purchaser takes that amount, and subsequently the company issues other bonds all secured by the same mortgage, the former bonds will have priority over those who purchased the additional bonds with notice of the agreement, but never over those who had no notice.—*McMurray v. Moran*, 134 U. S. 150.

**PURPOSES:** A mortgage is void which is made to secure railroad bonds issued for purposes not authorized by the statute and not in the mode therein prescribed.—*Commonwealth v. Smith*, 10 Allen, 448.

**CONSTITUTIONAL LIMITATION:** See Constitution of Idaho, Art. 11, Sec. 9.

**Section 2165. Must Provide Sinking Fund:** The directors must provide a sinking fund, to be specially applied to the redemption of such bonds on or before their maturity and may also confer on any holder of any bond or note issued, for money borrowed or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon into stock of such corporation, at any time within eight years from the date of such bonds, under such regulations as the directors may adopt.

1887 R. S. Sec. 2665.

**Section 2166. Enumeration of Powers:** Every railroad corporation has power:

First. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and employees may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto;

Second. To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it to aid and encourage the construction, maintenance, and accommodation of such railroad;

Third. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road;

Fourth. To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same; *Provided*, That any such railroad corporation may take and hold any right of way or other property, of whatever width or extent that it may acquire under the laws of Congress;

Fifth. To construct its road across, along or upon any stream of water( water course, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation must restore the stream or water-course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise;

Sixth. To cross, intersect, join or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is or shall be hereafter, intersected by any new railroad, must unite with the owners of such new railroad in forming such new intersections and connections, and grant facilities therefor. And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections and connections, the same must be ascertained and determined as is provided in the Code of Civil Procedure;

Seventh. To purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in the Code of Civil Procedure for the condemnation of lands; and to change the line of its road in whole or in part whenever a majority of the directors so determine, as is provided hereinafter, but no such change must vary the general route of such road as contemplated in its articles of incorporation;

Eighth. To carry persons and property on their railroad and receive tolls or compensation therefor;

Ninth. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery for the accommodation and use of their passengers, freight and business;

Tenth. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor within the limits prescribed by law, and subject to alteration, change or amendment by the legislature at any time.



Eleventh. To regulate the force and speed of their locomotives, cars, trains, or other machinery used and employed on their road, and to establish, execute, and enforce all needful and proper rules and regulations for the management of its business transactions usual and proper for railroad corporations.

1887 R. S. Sec. 2666.

**PRELIMINARY SURVEY:** "I do not mean to be understood that the legislature may not authorize a mere entry upon land of another for the purpose of examining or of making preliminary surveys, etc., which would otherwise be a technical trespass, but no real injury to the owner of the land although no previous provision was made by law to compensate the individual for his property, if it should afterwards be taken for the public use."—Walworth, Ch. In the case of *Bloodgood v. Mohawk H. R. R. Co.* 18 Wend. 9.

**ELEMENTS TO BE CONSIDERED IN ESTIMATING DAMAGES AND BENEFITS:** Every element arising from the construction and operation of the railroad or other public improvement, which, in an appreciable degree, is capable of ascertainment in dollars and cents, that enters into the diminution or increase of the value of the particular property, is properly to be taken into consideration in determining whether there has been damage and the extent of it, on the other hand, a consideration of the facts or circumstances tending to show those general benefits supposed to flow to the community at large, or to the public generally, from the construction of the proposed railroad or other public work, and the effect of which can be no other than conjectural or speculative, should be excluded.—*Met. W. S. E. Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098.

**REAL ESTATE:** A railroad company that has purchased a bed for a right of way across land is not liable for the expense of removing a building therefrom in the absence of an agreement to that effect.—*Delsol v. S. P. R. Co.* (Idaho), 40 Pac. 59. A railroad company has no authority to acquire land for purposes of speculation under a grant of power to acquire and hold sufficient real estate for the construction of its road and for the erection of depots, engine houses, etc.—*Pac. R. Co. v. Seely*, 45 Mo. 212. A railroad company having acquired its road by purchase and grant from the state, is the legal owner of the road, and has by the express terms of its active incorporation, the entire and exclusive right of its possession and control.—*Williams v. Michigan Central R. Co.* 2 Mich. 259.

**CONSTRUCTION:** The right of a

railroad company in its road bed, under an arrangement by which it has power to construct and use a track and hold the same for railroad purposes, amounts only to a permissive license, and gives no right to the soil. Any stone, therefore, excavated in grading the track and not actually used in the construction of the track, belongs to the owner of the land and cannot be removed without his permission.—*Chapin v. Sullivan R. Co.* 39 N. H. 564. But the company may use stone and gravel from one portion of their line in the proper construction of any other portion thereof, even though they do not own the land, but only have permission to use it for railroad purposes.—*Id.* But they have no right to sell such material to third parties.—*Aldrich v. Drury*, 8 R. I. 554. A railroad company is not entitled to compensation for laying out a highway across its tracks when none is given by statute.—*State v. C. B. & Q. R. Co.* (Neb.), 45 N. W. 469.

**INTERSECTIONS:** One railroad company may condemn the right to cross the lands of another company of the same character, although these lands may be necessary for the railroad purposes of the latter company.—*National Docks and N. J. J. C. Ry. Co. v. State*, 21 Atl. 570. In such case, all that is required is the privilege or easement of crossing. The place of crossing is to be and to remain in the common use of both companies for the exercise of their respective franchises.—*Id.* If a company whose road forms a junction with another road, relies upon the employees of the latter to attend to the switch, it is not relieved from responsibility on the ground that it did not employ the switchmen.—*Taylor v. Western P. R. Co.* 45 Cal. 323. A railroad company will not be denied the right to cross the tracks of another simply because the crossing will necessitate the raising of the latter's road eighteen inches where the new grade is necessary because of another crossing.—*Butte A. & P. Ry. Co. v. Montana U. Ry. Co.* (Mont.), 41 Pac. 248. As to the measure of damages in case of one railroad crossing another, see Code of Civil Proc.

**EMINENT DOMAIN:** See Code of Civil Proc.

**CONSENT OF LOCAL AUTHORITIES:** As to the consent of local au-

thorities for a railroad's occupancy of streets and highways, see Idaho Const. Art. XI, Sec. 11. A railroad company authorized by the city to construct and operate its road through a street of the city, is not liable to an abutting owner to damages when the operation of its road on the street with reasonable care or for injuries not wantonly done, where the fee of the street is in the city, and the city is authorized by its charter to control and direct the location of railroad tracks therein.—*Colo. Cent. R. Co. v. Mollandin*, 4 *Colo.* 154.

**STATIONS:** When mandamus will lie to compel the construction and maintenance of a station and stopping of trains thereat.—*N. P. R. Co. v. Terr. of Washington*, 142 *U. S.* 492. An agreement to establish a station in consideration of the grant of the right of way will generally be specifically enforced.—*Hooker v. Chicago M. & St. P. R. Co.* (*Wis.*), 44 *N. W.* 1085. Railroad companies may change the location of stations when the convenience of the public requires it.—*Mobile & Ohio R. Co. v. People* (*Ill.*), 24 *N. E.* 642.

**RATES AND CHARGES:** State legislatures have power to fix maximum rates for the carriage of passengers and freight, and the courts can only interfere therewith to protect the railroads from unreasonableness.—*Chicago and G. T. R. Co. v. Wellman*, 143 *U. S.* 339; *Reagan v. Farmers' L. & T.*

*Co.* 154 *U. S.* 362. A foreign corporation is subject to regulation by the state in which it is operating as to its charges for transportation.—*St. Louis, etc. R. Co. v. Gill* (*Ark.*), 15 *S. W.* 18. As to the regulation of rates and tolls and discrimination and preference in the same, see Idaho Const. Art. 11, Sec. 6.

**RULES AND REGULATIONS:** A rule requiring passengers to exhibit their tickets to the gate-man and have them punched, also a rule forbidding the boarding of a train while in motion, are reasonable and valid.—*Dickerman v. St. Paul Union Depot Co.* (*Minn.*), 46 *N. W.* 907. A rule requiring conductors to collect ten cents extra fare of those not having tickets, held valid.—*Reese v. P. R. Co.* 131 *Pa. St.* 422, 19 *Atl.* 72. A rule requiring passengers to remain in the cars provided for them and prohibiting riding in an express car or other place of increased danger set apart for other purposes, is reasonable.—*Fla. S. R. Co. v. Hirst*, 30 *Fla.* 1, 16 *L. R. A.* 631, 11 *So.* 506.

**BUSINESS REGULATIONS:** The right of railroads to limit the time within which a ticket shall be good for passage is discussed at length in 6 *Lewis' Am. R. & Corp. Rep.* 544 note. A regulation limiting liability to \$200 in case of an ordinary horse and providing for an increased rate for horses of greater value is reasonable and valid.—*Duntley v. Boston & Maine R. Co.* (*N. H.*), 20 *Atl.* 327.

### **Section 2167. Map and Profile of Line to be Filed:**

Every railroad corporation in this State must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land acquired for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the secretary of state; and also like maps of the parts thereof located in different counties, and file the same in the office of the recorder of the county in which such parts of the road are there to remain of record forever. The maps and profiles must be certified by the chief engineer, the acting president and secretary of such company, and copies of the same, so certified and filed, be kept in the office of the secretary of the corporation, subject to examination by all parties interested.

1887 R. S. Sec. 2667.

### **Section 2168. Change of Line of Road, Steps Necessary:**

If, at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision 7, section 2166, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are on file, and may proceed, in the same manner as the original location was acquired,



to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location, within five years after such change. No new location as herein provided, must be run so as to avoid any points named in their articles of incorporation.

1887 R. S. Sec. 2668.

### **Section 2169. Time of Commencing Construction.**

**Annual Construction:** Every railroad corporation must within two years after filing its original articles of incorporation, begin the construction of its road and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.

1887 R. S. Sec. 2669.

**FORFEITURE OF FRANCHISES:** A private corporation created by the legislature may lose its franchises by a mis-user or non-user of them, but they must be resumed by the government under judicial judgment upon a quo warranto to ascertain and enforce the forfeiture.—State v. Commercial

Bank, 13 S. & M. 569. The forfeiture of the charter of a corporation cannot be set up by a stockholder as a defense to an action against him for assignment on stock. The forfeiture can only be taken by the state in direct proceedings against the corporation.—Conn. etc. R. Co. v. Bailey, 24 Vt. 465.

**Section 2170. Crossings and Intersections:** Whenever the track of one railroad intersects or crosses the track of another railroad, whether the same be a street railroad, wholly within the limits of the city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under the Code of Civil Procedure, and the damages assessed and the right of way granted as in other cases.

1887 R. S. Sec. 2670.

See note on intersections under Section 2166.

Eminent Domain: See Code Civil

Procedure.

**Section 2171. Use of Streets and Alleys in Cities and Towns:** No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of town or city authority from which the right must emanate.

1887 R. S. Sec. 2671.

See Const. Art. XI, Sec. 11.

Consent of local authorities: See note under Sec. 2166.

**Section 2172. Crossing Railroad or Highway:** Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over, or on a level with the track as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and materials as are necessary for the construction of such road or highway on such new line.

If such other necessary lands cannot be had otherwise, they may be condemned as provided in the Code of Civil Procedure, and when compensation is made therefor, the same becomes the property of the corporation.

1887 R. S. Sec. 2672.

Construction: See note under Section 2166.

### **Section 2173. Bridges Across Navigable Streams:**

Any railroad corporation heretofore duly organized and incorporated under the laws of this State, or of the United States, or any other state or territory, or which may hereafter be duly incorporated and organized under the laws of this State, or of the United States, or of any other state or territory, and authorized to do business in this State and to construct and operate railroads therein, shall have, and hereby is given, the right to build and construct, possess and own, bridges across the navigable streams and waters within this State, over or across which the projected line or lines of railway of such railroad corporation, or either of them, will run: *Provided*, That said bridges are to be constructed in good faith for the purpose of being made a part of the constructed line of said railroad, or a part of any of the line thereof to be constructed and in course of construction, and to be used by such railroad corporation as a part of its line of railroad so constructed, or to be constructed, for the more convenient, expeditious and safe operation thereof: *And Provided, further*, That such bridges shall be so constructed as not to interfere with, impede or obstruct the navigation of such stream or navigable waters, and shall comply with and be subject to the acts of Congress relating to navigable streams, and the rules and regulations of the executive departments.

1899, 5th Ses. p. 20; 1891, 1st Ses. p. 32.

**POWER OF THE STATES:** The states within which navigable streams lie may authorize the construction of bridges over them until congress intervenes and supervenes their authority, which congress may do, so far as necessary to secure free navigation.—*Cardwell v. A. R. Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959. The power of a state over bridges across navigable streams is plenary until congress acts on the subject.—*E. & L. M. T. Co. v. Chicago*, 107 U. S. 678, 27 L. Ed. 442.

**OBSTRUCTIONS:** A railroad company is not liable for obstructions in the channel or open space under a draw bridge over a navigable stream which the company has constructed properly, and under lawful authority if the obstructions are not caused by any instrumentality or fault of the

company.—*P. & A. R. Co. v. Hyer*, 32 Fla. 539, 22 L. R. A. 368, 14 So. 381.

**BRIDGE REPAIRS:** The obstruction of navigation by the repairing of a bridge over a river in replacing the draw-span, which bridge is maintained under lawful authority, creates no right of action in favor of the parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation although it was possible to have opened the draw and to have constructed the new one upon the edge of the river, thus avoiding all obstructions to navigation but which would have involved unreasonable expense and delay.—*G. B. R. N. Co. v. C. O. & S. W. R. Co. (Ky.)*, 2 L. R. A. 540, 10 S. W. 6. To the same effect is *Central Trust Co. v. Wabash, etc. R. Co.* 32 Fed. 566.

### **Section 2174. Right of Way Through State and School Lands:** The right of way through the State or school lands of Idaho is hereby granted to any railroad company duly organized under the laws of this State, or any other State, or by the Congress of the United States, having complied with the laws of this



State respecting foreign corporations doing business in this State, and having filed with the secretary of State a copy of its articles of incorporation and proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also ground adjacent to such right of way for station building or workshops not to exceed in amount five acres for each station or workshop to the extent of one station building or workshop for each five miles of its road;

*Provided*, That if any section of said road is not completed within five years after the filing of the articles of incorporation as provided herein, the rights herein granted shall be forfeited as to such uncompleted section of said road. Due proof of the completion of any section of said road shall be filed with the secretary of state immediately upon the completion thereof.

1899, 5th Ses. p. 361.

**RIGHTS OF COMPANY:** A railroad company having acquired its road by purchase and grant from the state is the legal owner of the road and has,

by the terms of its act of incorporation, the exclusive right of its possession and control.—*Williams v. M. C. R. Co.* 2 Mich. 259.

**Section 2175. Securing Benefit of Preceding Section:** Any railroad company desiring to secure the benefits of the preceding section shall within twelve months after the location of its road file with the secretary of State a profile of its road through such State, or school lands, and pay the State in cash the value of the lands sold as the value thereof shall be appraised by or under the direction of the State board of land commissioners: *Provided*, That no lands sold shall be appraised for a less sum than ten dollars an acre and in proportion thereto for a fractional part of an acre.

1899, 5th Ses. p. 362.

**Section 2176. Deed from State to Right of Way:** Upon compliance with all the provisions of the two preceding sections, the governor shall under the great seal of the State issue a deed therefor to the said railroad company, which deed shall be attested by the secretary of state and the secretary of the state board of land commissioners, and a record thereof shall be kept in the office of the state board.

1899, 5th Ses. p. 362.

**Section 2177. Extending Lines and Building Branch Roads:** Any railroad corporation chartered by or organized under the laws of this State, or any state or territory, or under the laws of the United States and authorized to do business in this State, may extend its railroad from any point named in its charter or articles of incorporation, or may build branch roads, either from any point on its line of road or from any point on the line of any other railroad connecting, or to be connected, with its road, the use of which other road between such points and the connection with its own road such corporation shall have secured by lease or agreement for a term of not less than ten years from its date. Before making any such extension, or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceed-

ings, designate the route of such proposed extension or branch by indicating the place from and to which said railroad is to be constructed, and the estimated length of such railroad, and the name of each county in this State through or into which it is constructed or intended to be constructed, and file a copy of such record certified by the president and secretary, in the office of the secretary of state, who shall indorse thereon the date of filing thereof and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension or build such branch, and receive aid thereto, which it would have had if it had been authorized in its charter or articles of incorporation.

1899, 5th Ses. p. 81.

**Section 2178. Consolidation of Stock With Other Lines, Leasing Roads:** Any such railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the State, when such other railroad corporation does not own any competing line of railroad, upon such terms as may be agreed upon, and become one corporation, by any name selected, which within this State, shall possess all the powers, franchises and immunities, including the right of further consolidation with other corporations under this section, and be subject to all the liabilities and restrictions such as such corporations peculiarly possess, or were subject to at the time of consolidation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock, in person or by proxy, at the regular annual meeting thereof, or a special meeting called for that purpose in the manner provided by the by-laws of the respective consolidating corporations, or by the consent in writing of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval or such consent, and accompanied by lists of their stockholders and the number of shares held by each, duly certified by the respective presidents and secretaries, with the respective corporate seals of such corporations affixed, shall be filed for record in the office of the secretary of state before any such consolidation shall have any validity or effect.

Any railroad corporation whose line is wholly or in part within this State, whether chartered by or organized under the laws of this State, or of any other state or territory, or of the United States, may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities, and all other property or appurtenances, appertaining thereto; or any railroad company may sell or lease the whole or any part of its railroad or branches within or without this State, constructed or to be constructed, together with all property and rights, privileges and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States, or of this State, or of any other state or territory of the United States. And all such purchases or leases heretofore made or entered into are for all intents



and purposes hereby ratified and confirmed: *Provided*, That in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated, at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation.

1901, 6th Ses. p. 214; 1891, 1st Ses. p. 125, Sec. 2.

See Const. Idaho, Art. 11, Sec. 15.

**LIABILITY OF NEW COMPANY:**

Where two or more railroad companies are consolidated under the laws of the state, the new or consolidated company is answerable for the obligations of the old companies, including torts, in the absence of any stipulations or evidence to the contrary.—*Berry v. K. C. F. S. & M. R. Co.* (Kan.), 34 Pac. 805; *Hutchinson & S. R. Co. v. Fair* (Kan.), 48 Pac. 591, but a railroad company that has leased its road under due authority of law is not liable for injuries inflicted by the lessee company or an agent or servant of the latter in operating its road.—*V. M. R. Co. v. Washington* (Va.), 7 L. R. A. 344, 10 S. E. 927.

**VOID TRANSFER:** The act of Cong. Mar. 3, 1871, incorporating the T. & P. R. Co. and granting in aid lands, authorized it by Section 4 to purchase

the land grant and franchise of and to consolidate with any railroad company along its route. Section 5 authorized it to make traffic arrangements with other companies. Section 6 provided that the rights, franchises and property of every description belonging to the consolidated or purchased companies, should vest in and become the property of the T. & P. Co. Held, that said company could not transfer its own land grant and franchises and retain merely an easement in the right of way.—*S. P. R. Co. v. Esquibel* (N. M.), 20 Pac. 109.

**LEASE:** Any company organized under the laws of Kansas, may lease the road and appurtenances of any other company, when the road so leased shall become, in the preparation thereof, a continuance and extension of the road accepting the lease.—*A. T. & S. F. R. Co. v. Fletcher* (Kan.), 10 Pac. 596.

**Section 2179. Railroads May Extend Their Lines into This State:**

Any railroad corporation chartered by or organized under the laws of the United States, or of any state or territory, whose constructed railroad shall reach or intersect the boundary line of this State at any point, may extend its railroad into the State from any such point or points to any place or places within this State, and may build branches from any point on such extension. Before making such extension, or building any such branch road, such corporation shall, by resolution of its directors or trustees, to be entered in the record of its proceedings, designate the route of such proposed extension or branch by indicating the place from and to which such extension or branch is to be constructed and the estimated length of such extension or branch, and the name of each county in this State through or into which it is constructed or intended to be constructed, and file a copy of such record, certified by the president and secretary, in the office of the secretary of state, who shall indorse thereon the date of filing thereof and record the same. Thereupon such corporation shall have all the rights and privileges to make such extension, or build such branch, and receive such aid thereto as it would have had had it been authorized so to do by articles of incorporation duly filed in accordance with the laws of this State.

1899, 5th Ses. p. 82, portion of Sec. 2; 1891, 1st Ses. p. 126, portion of Sec. 2

**Section 2180. May Purchase, Hold or Guarantee Bonds of Certain Other Lines:** Any railroad corporation, whether chartered by, or organized under, the laws of this State or

of the Territory of Idaho, or of the United States, or of any other state or territory, may take, purchase, hold, sell, and dispose of, or guarantee, the payment of, the bonds and securities of any other railroad corporation whose line of railroad is continuous of, or by lease, traffic contract, or otherwise connected with, its own line.

1899, 5th Ses. p. 10; 1891, 1st Ses. p. 17.

**Section 2181. Must Use Checks for Baggage:** A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employee of a railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employee of the railroad corporation, he may recover the value thereof from the corporation.

1887 R. S. Sec. 2674.

**DELAY OF BAGGAGE:** A carrier, which without sufficient reason fails to ship the trunk of a passenger upon a limited train because of his own negligence in omitting to place the proper tag upon such trunk but ships it upon a later train, which comes in contact with a flood, in itself the act of God, by reason of which the baggage is destroyed, is liable for the loss.—*Wald v. P. C. C. & St. L. R. Co.* 162 Ill. 545, 35 L. R. A. 356, 44 N. E. 888.

**WHAT IS BAGGAGE:** Money sufficient for personal use may be included in baggage for which the carrier will be liable.—*St. L. S. W. R. Co. v.*

*Berry* (Ark.), 28 L. R. A. 501, 30 S. W. 764.

Baggage within the rule of the carrier's liability is confined to the articles usually carried as such for the personal use of the passenger, or for his convenience, instruction or amusement on a journey, and does not include that which is carried for the purpose of business, such as merchandise or the like.—*Oaks v. N. P. R. Co.* 20 Or. 392, 26 Pac. 230. Articles which are not properly personal baggage, but which are taken by the passenger as such, with the carrier's knowledge, either with or without payment of an extra charge, will be regarded as such in respect to the carrier's liability.—*Id.*

**Section 2182. Duty Respecting Transportation of Persons and Property:** Every such corporation must start and run their cars for the transportation of persons and property, at such regular times as they shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or is offered for transportation at the place of starting, at the junction of other railroads and at siding, and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of toll, freight or fare therefor; and it shall be the duty of railroad companies, when intersecting or crossing any other railroads in this State, so to arrange their side tracks or switches that cars or freight may be readily transferred from one track to the other at the option of the shipper.

1887 R. S. Sec. 2675 and latter part of Sec. 3; 1899, 5th Ses. p. 82; 1891, 1st Ses. p. 126.

**DUTIES OF CARRIERS:** Owners of a railroad are liable for damages—sustained by a refusal to transport



persons or property without reasonable excuse for payment of the usual fare.—*Beekman v. Saratoga, etc. R. Co.* 2 Paige Ch. 45.

**ACCOMMODATION:** Passenger carriers must exhibit utmost care and diligence of very cautious persons and are responsible for injuries caused by the slightest negligence, or which human care and foresight could prevent.—

**Section 2183. Damages for Refusal to Transport Person or Property:** In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit.

1887 R. S. Sec. 2676.

**BOUND TO CARRY PASSENGERS AND FREIGHT:** Owners of a railroad are liable for damages sustained by a refusal to transport persons and property without reasonable excuse upon the payment of the usual fare.—*Beekman v. Saratoga, etc. R. Co.* 3 Paige Ch. 45. Railroad companies as common carriers must furnish such facilities for transportation as will

*Johnson v. Winona, etc. R. Co.* 11 Minn. 296; *Deyo v. N. Y. C. R. Co.* 34 N. Y. 2.

**TIME SCHEDULE:** A railroad company, by advertising the times when its trains run, agrees with the holders of tickets that its train will run at such times, but with an implied reservation of power to change the times, upon giving reasonable notice.—*Sears v. Eastern R. Co.* 14 Allen 432.

meet the ordinary demands of the public, but they are not bound to anticipate or to provide in advance for an unusual influx of freight.—*Galena, etc. R. Co. v. Rae*, 18 Ill. 488. So, a railroad company is not bound to transport perishable property to the exclusion of other general freight not perishable.—*Dixon v. C. etc. R. Co.* 64 Iowa. 531, 21 N. W. 17.

**Section 2184. Accommodations for Passengers:** Every railroad corporation must furnish on the inside of its passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers or any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars.

1887 R. S. Sec. 2677.

**CARS OTHER THAN PASSENGER CARS:** A railroad company was held liable for injuries sustained by a passenger in riding in a caboose which became detached from the train and collided with another train in the rear.—*Louisville, etc. R. Co. v. Faylor*, 126 Ind. 26, 25 N. E. 869. A person riding free in a baggage car with the knowledge of a conductor is not by reason of such facts precluded from recovering from an injury, even though he might not or would not have been injured had he remained in a passenger car.—*Washburn v. Nashville, etc. R. Co.* 3 Head. 638. Similarly held, where the injured person rides in a freight car.—*Everett v. O. S. L. and U. N. Ry. Co.* (Utah), 34 Pac. 289.

**PASSES:** A person riding on a free

pass does not relinquish his right of action for personal injury caused by the negligence of the railroad company, and this is so in spite of express stipulations on the face of the pass exempting the railroad company from such liability.—*Indiana Central R. Co. v. Mundy*, 21 Ind. 48; *Seybolt v. N. Y. etc. R. Co.* 95 N. Y. 562. But see *Muldoon v. Seattle City Ry. Co.* (Wash.), 35 Pac. 422 contra.

**RIGHT TO A SEAT:** A passenger may occupy a seat in a parlor car where there are no seats in the ordinary coaches.—*Thrope v. N. Y. Cen. & H. R. R. Co.* 76 N. Y. 402. Where a passenger refuses to surrender his ticket because no seat is provided him, he cannot be held in an action for the fare.—*Davis v. K. C. etc. R. Co.* 53 Mo. 317.

**Section 2184. Must Print and Post Rules and Regulations:** Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regula-

tions regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel or freight car, in violation of such printed regulations, or in violation or positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section.

1887 R. S. Sec. 2678.

Rules and regulations which a railroad company may make respecting

passengers and others not employees, extensive notes and cases cited.—41 Am. Dec. 471-486; 45 Am. Dec. 192-199.

**Section 2186. Must Construct Fences, When:** Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, whenever the line of their road at any time passes through or along, or abuts upon, or is contiguous to, private property, or enclosed land in the actual possession of another. Railroad corporations paying to the owner of the land through or along which their road is located, an agreed price, for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees.

1887 R. S. Sec. 2679.

Under the provision of this section a railroad corporation must make and maintain a good and sufficient fence on both sides of its track, where the line passes through private land.—*Patrie v. Oregon Short Line R. Co. (Idaho)*, 56 Pac. 82. Under the provisions of Section 1240, Rev. St., and the act amendatory thereof (Sess. Laws 1891, p. 48, Sec. 734, Political Code), where a stallion that escaped from its owner without his fault, and is killed by a railroad at a point where the company is required by law to fence its track, and has not done so, it is liable to the owner for the value of the stallion.—*Patrie v. Oregon Short Line R. Co. (Idaho)*, 56 Pac. 82. If it fails to do so it is liable for stock killed at the point where it is required to fence its track.—*Patrie v. Oregon Short Line R. Co. (Idaho)*, 56 Pac. 82. Where a public highway is located across a right of

way of a railroad company, which was fenced at the time and at the place where no cattle guard was required, the cost of making the cattle guard must be borne by the county.—*Atchison T. & S. F. R. Co. v. Board of Com's. of Lyon County (Kan. App.)*, 56 Pac. 140. The statute requiring railroad corporations to maintain cattle guards at road crossings applies as well to streets which are crossed by railroads in villages as to county highways.—*Brace v. N. Y. Central R. R. Co.* 27 N. Y. Apps. 269. It seems, however, that where a village street crosses a railroad running along another street, the corporation is not to construct cattle guards longitudinally along its tracks so as to impede the passage along the street crossing it.—*Brace v. New York Central R. R.* 27 N. Y. Apps. 269; *Johnson v. Oregon Short Line R. Co.* 63 Pac. 112.

**Section 2187. Liable for Stock Killed, when:** Every railroad company or corporation operating any line or railroad within this State, that hereafter negligently maims or kills any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer or calf,



or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal or animals, is liable to the owner of such animal or animals for the damages sustained by such owner by reason thereof; and in all actions for the recovery of damages under this section, proof of the maiming or killing of such animal or animals by the railroad company or corporation shall be prima facie evidence of negligence on the part of such railroad company or corporation: *Provided*, That a claim in writing for such damages signed by the owner or his agent must be made upon such railroad company or corporation within three months after such maiming or killing: *And provided, further*, That any action brought for the recovery of damages under this section must be commenced within six months after such maiming or killing.

1901, 6th Ses. p. 87.

**CONSTITUTIONAL LAW, DUE PROCESS OF LAW:** An act which fixes the absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business without any wrong, fault, or neglect on its part when, under the general law of the land, no one else, is so liable under such circumstances, does not provide the "due process of law" provided for by the constitution of the United States, and is therefore void.—*Cateril*

*v. Union Pac. Ry. Co.* 2 Idaho, 540, 21 Pac. 416.

**NEGLIGENCE:** Railroad company held not liable for injury to animals where there is an entire absence of proof of negligence on the part of the railroad company.—*Jones v. O. S. L. R. Co.* (Idaho), 56 Pac. 77. Plaintiffs were guilty of contributory negligence and were not entitled to recover from defendants for the loss of animals killed on defendant's tracks.—*McDonald et al. v. Great Northern Ry. Co.* (Idaho), 46 Pac. 766.

### **Section 2188. Description of Stock Killed, Book of:**

Every railroad company must keep a book at a principal station in each county into or through which its road runs to be designated by the company, and a notice of the station so designated must be filed with the recorder of the county in which the station is located, and every such company must cause to be entered in said book within fifteen days after the killing or maiming of any animal, a description as nearly as may be of such animal, its color, age, marks and brands, and keep said book subject to public inspection. Should any company fail to keep such book, or to file such notice in the manner herein provided, or to enter therein such description of any animal maimed or killed, for a period of fifteen days thereafter, such company is liable to the owner of such animal for twice the value thereof.

1887 R. S. Sec. 2681.

**Section 2189. Ownership of Body of Animal Killed.**  
**Brands:** In case of maiming or killing of any cattle, sheep or hog, the body of the animal belongs to the company, unless the owner elects, within twelve hours, to take the same in satisfaction, or reduction of damages; the company may proceed to take care of and preserve the body of such animal, and must, unless taken by the owner, take off enough of the hide to show distinctly any brands on such animal, also both ears, including the hide between the ears, and in such way as to keep the ears together, and the pieces of the hide so taken off, and the ears of each animal must be attached together and

be preserved for at least three months for inspection at the station house nearest to the place where such killing or maiming occurred; and for every failure so to keep any such pieces of hide and ears for inspection, the company, in addition to the damages to the owner, forfeits one hundred dollars, to be recovered in an action in the name of the State, in any court of competent jurisdiction, one half to be paid into the school fund of the county, and the residue to the informer.

1887 R. S. Sec. 2682, amended 1889, 15th Ses. p. 41.

**Section 2190. Bell and Whistle:** A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the prosecuting attorney of the proper county, for the use of the State. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

1887 R. S. Sec. 2683.

**CONTRIBUTORY NEGLIGENCE:** Where an injury at a railroad crossing is caused by a locomotive upon which the bell was not kept ringing continuously nor a whistle blown at intervals of the distance of eighty rods before reaching the crossing, and also when passing over it, as required by statute, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his

own negligence. And it need not be further proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury.—*Orcutt v. P. C. Ry. Co.* 85 Cal. 291, 24 Pac. 661. But the failure to ring the bell does not abrogate the doctrine of contributory negligence.—*Meeks v. S. P. R. Co.* 52 Cal. 602; *Hager v. S. P. R. Co.* 98 Cal. 309, 33 Pac. 119; *Glascock v. C. P. R. Co.* 73 Cal. 137, 14 Pac. 518.

**Section 2191. Passenger Refusing to Pay Fare May be Put Off:** If any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, the conductor and employees of the corporation may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, on stopping the train.

1887 R. S. Sec. 2684.

**WHAT IS FARE:** Where a return coupon of a round trip ticket is taken up by mistake and a going coupon is presented for the return trip with an explanation, it is the duty of the conductor to accept it, and ejection for a refusal to pay fare is wrongful.—*L. E. & W. R. v. Fix*, 88 Ind. 381. Likewise, where an agent wrongfully refuses to stamp return trip coupon and the ticket was rejected and passenger was expelled, the company was held liable.—*Mo. Pac. R. Co. v. Martino (Tex.)*, 18 S. W. 1066. But where a passenger desires to go to a station at

which the train does not stop, he can only travel to the next station beyond by paying his fare to that station and may be ejected for refusal to pay.—*Logan v. Hannibal & St. J. R. Co.* 77 Mo. 663.

**EXPULSION FROM TRAIN:** Where a conductor collects insufficient fare and then discovers his mistake and demands the balance, the passenger may be put off for refusal to pay such fare.—*Wardwell v. C. M. & St. P. R. Co. (Minn.)*, 49 N. W. 206. Where an expulsion for good cause has commenced, the passenger cannot arrest it by an offer to pay or impose upon the com-



pany the obligation to carry him.—*Atchison, etc. R. Co. v. Dwelle (Kan.)*, 24 Pac. 500. But see *Gould v. C. M. & R. Co.* 5 McCrary, 502, contra. And it is held that if a passenger differs from a conductor as to the amount of fare he should pay, and declines to pay the amount asked, he should be allowed

time to tender and pay the fare demanded after steps have been taken to stop the train.—*Pac. Express Co. v. Darnell Bros.* 62 Tex. 639. The amount of force used must under no circumstances be such as to endanger the life or person of the passenger.—*Law v. I. C. R. Co.* 32 Iowa 534.

**Section 2192. No Exemption from Taxation:** Nothing in this Chapter contained shall ever be so construed as to exempt any railway property from taxation.

1899, 5th Ses. p. 82; 1891, 1st Ses. p. 127, Sec. 5.

Taxation of railroads: See Political Code, Section 1357 et seq.

## CHAPTER LXXXII.

### TELEGRAPH AND TELEPHONE CORPORATIONS.

#### Section.

2193. Right of way for poles and wires.

2194. Liability for injuring property of.

2195. Amount of damages recoverable for injury.

#### Section.

2196. Corporation may sell its property.

**Section 2193. Right of Way for Poles and Wires:** Telegraph and telephone corporations may construct lines of telegraph or telephone along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters.

1887 R. S. Sec. 2700.

**GRANT OF FRANCHISE BY RAILROAD, VOID:** Revised Statutes of the United States, Section 5263, authorizing companies to operate lines of telegraph over any portion of the public domain, along any of the military or post roads of the United States which have been or may hereafter be

declared such by law, over navigable streams of the United States, etc. in effect, prohibiting a railroad company from granting an exclusive franchise along its right of way to any single telegraph company.—*Union Trust Co. of N. Y. v. A. T. & S. F. R. Co. (New Mexico)*, 43 Pac. 701.

**Section 2194. Liability for Injuring Property of:** Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph or telephone corporation, is liable to the corporation for all damages sustained thereby.

1887 R. S. Sec. 2701.

**Section 2195. Amount of Damages Recoverable for Injury:** Any person who wilfully or maliciously does any injury to any telegraph or telephone property mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction.

1887 R. S. Sec. 2702.

**Section 2196. Corporation May Sell Its Property:** Any telegraph or telephone corporation may, at any time, with the

consent of the persons holding two-thirds of the issued stock of the corporation, sell, lease, assign, transfer, or convey any rights, privileges, franchises, or property of the corporation, except its corporate franchise.

1887 R. S. Sec. 2703.

## CHAPTER LXXXIII.

### BRIDGE, FERRY, FLUME AND BOOM CORPORATIONS.

Section.

2197. Must not take tolls until licensed.  
2198. When franchise ceases.

Section.

2199. Applies to natural persons.

#### **Section 2197. Must not Take Tolls Until Licensed:**

When a corporation is formed for the construction and maintenance of a bridge, ferry, flume or boom, or for two or more of said purposes, it must not take tolls on or for the same until authority is granted therefor by the board of county commissioners of the county or counties where its flume or abutments, landings or anchorages are situate. But after such authority is granted it may demand and receive such tolls as it is so authorized to take, and may, when necessary, secure the right of way for its flume, and the necessary chutes, raceways, landings, abutments and anchorages under the provisions of the Code of Civil Procedure.

1887 R. S. Sec. 2694.

**Section 2198. When Franchise Ceases:** Every such corporation ceases to be a body corporate :

First. If, within one year from filing its articles of incorporation it has not commenced the construction of its bridge, flume or boom, as the case may be, and if within two years from such filing its bridge or boom is not completed ;

Second. If, when the bridge or boom of such corporation is destroyed, it is not reconstructed and ready for use within two years thereafter ;

Third. If the ferry of any such corporation is not in running order within four months after authority to take tolls thereon is obtained, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

1887 R. S. Sec. 2695.

**Section 2199. Applies to Natural Persons:** When a bridge, ferry, flume or boom is operated or owned by a natural person, this chapter is applicable to such person in like manner as it is applicable to corporations.

1887 R. S. Sec. 2696.

## CHAPTER LXXXIV.

### WATER AND CANAL CORPORATIONS.

Section.

2200. Contracts for supplying city or town.  
2201. Must furnish pure water. Rate, how determined.

Section.

2202. Right of way for laying pipes.  
2203. Must build and keep in repair bridges.



**Section 2200. Contracts for Supplying City or Town:**

No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts, so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

1887 R. S. Sec. 2710.

**SUIT BY PRIVATE PARTY:** In this case the defendant water company had a contract with the city, by which it agreed to supply the city with water sufficient for water purposes, held, that an individual citizen, whose property had been destroyed by fire through the alleged neglect of the water company in complying with the terms of such contract, had no right of action against the company.—*Bush v. Artesian Hot and Cold Water Co.* (Idaho), 43 Pac. 69, (cases cited.)

**LEGISLATION ABROGATING CONTRACT:** Where, under and by virtue of powers granted in its charter,

an incorporated city makes a contract with certain parties and their assigns to construct certain waterworks, and to furnish the city with water for fire purposes, upon the payment of a stipulated sum by the city, and the parties proceed to construct such works, and the same are accepted by the city, and the water supplied and paid for as stipulated for a series of years, the validity of the contract cannot be impeached or impaired by the enactment of a law by the legislature which went into effect some three months after the contract was made.—*Bellevue Water Co. v. City of Bellevue*, 35 Pac. (Idaho), 963.

**Section 2201. Must Furnish Pure Water. Rate, how Determined:**

All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of persons upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by commissioners to be selected as follows:

Two by the city or town authorities, or when there are no city or town authorities, by the board of commissioners of the county, and two by the water company; and in case a majority cannot agree to the valuation, the four commissioners must choose a fifth commissioner; if they cannot agree upon a fifth, then the probate judge of the county must appoint such fifth person. The decision of the majority of the commissioners must determine the rates to be charged for water for one year, and until new rates are established. The board of county commissioners or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the state.

18877 R. S. Sec. 2711.

The clause of this section requiring a water company, receiving and accepting the privileges conferred by the statute, to furnish the city or town water for fire purposes and other great

necessities free, held to be constitutional. Sullivan, J. dissenting.—*City of Boise City v. Artesian Hot & Cold Water Co.* (Idaho), 39 Pac. 362. For opinion on rehearing see 39 Pac. 566.

**Section 2202. Right of Way for Laying Pipes:** Any corporation created under the provisions of this Title for the purposes named in this chapter, subject to the reasonable direction of the

board of county commissioners, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town, city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town or city, or through or into any part thereof.

1887 R. S. Sec. 2712.

**Section 2203. Must Build and Keep in Repair Bridges:** Every water or canal corporation must construct and keep in good repair at all times for public use, across their canal, flume or water pipe, all of the bridges that the board of commissioners of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways; and all water works must be so laid and constructed as not to obstruct public highways.

1887 R. S. Sec. 2713.

A city having extended its limits and platted its streets across a ditch, the owner thereof must bridge the same at his own expense whenever such ditch obstructs the free passage or use

of such streets. If he fails to do so, the ditch becomes a public nuisance and may be bridged by the city at the expense of the owner.—*Boise City v. Boise Rapid Transit Co.* (Idaho), 59 Pac. 716.

## CHAPTER LXXXV.

### HOMESTEAD CORPORATIONS.

#### Section.

2204. Homestead corporations defined. Corporate existence.

2205. By-laws must specify what. Printed copies of.

2206. Sale of forfeited stock, proceedings on.

2207. May borrow and loan money.

2208. Children and married women may hold stock.

#### Section.

2209. Must not speculate; penalty for.

2210. Proceedings on termination of corporation.

2211. Payment of premiums.

2212. Financial report to be published annually.

2213. Publication in certain cases.

**Section 2204. Homestead Corporations Defined. Corporate Existence:** Corporations organized for the purpose of acquiring lands in large tracts, paying off incumbrances thereon, improving and sub-dividing them into homestead lots or parcels, and distributing them among the shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than ten years.

1887 R. S. Sec. 2720.

**Section 2205. By-Laws must Specify What. Printed Copies of:** Such corporations must specify in their by-laws the times when the installments of the capital stock are payable, the amount thereof, and the fines, penalties, or forfeitures, incurred in case of default. A printed copy of the articles of incorporation and by-laws must be furnished to any shareholder on demand.

1887 R. S. Sec. 2721.

**Section 2206. Sale of Forfeited Stock, Proceeding on:** Whenever any shares of stock are declared forfeited by resolution of the board of directors, the directors may advertise the same



for sale, giving the name of the subscriber and the number of shares by notice of not less than three weeks, published at least once a week in a newspaper of a general circulation in the city, town, or county where the principal place of business of such corporation is located. Such sale must be made at auction, under the direction of the secretary of the company. The corporation may be a bidder, and the shares may be disposed of to the highest bidder for cash.

No defect, informality, or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made, the secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all installments then due, and all expenses and charges of sale, must hold the residue subject to the order of the delinquent subscriber.

1887 R. S. Sec. 2722.

**Section 2207. May Borrow and Loan Money:** Homestead corporations may borrow money for the purposes of the corporation not exceeding at any one time one-fourth of the aggregate amount of shares or parts of shares actually paid in, and the income thereof; no greater rate of interest must be paid therefor than twelve per cent per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the security of their shares on the land thus purchased, or that owned by the corporation at the time of procuring the loan any sum of money which, together with the interest contracted to become due thereon, will not exceed ninety per cent of the unpaid amount subscribed by the share holders; but no loan must be made to the corporation for a term extending beyond that of its existence.

1887 R. S. Sec. 2723.

**Section 2208. Children and Married Women May Hold Stock:** Such shares of stock in homestead corporations as may be acquired by children the cost of which, and the deposits and assessments on which are paid from the personal earnings of the children, or with gifts from persons other than their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire with their personal earnings, or those of their children, voluntarily bestowed therefor, or from property bequeathed or given to them by persons other than their husbands.

1887 R. S. Sec. 2724.

**Section 2209. Must not Speculate; Penalty for:** Homestead corporations must not purchase or sell, or otherwise acquire and dispose of real property or any interest therein, on any personal property for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property or any interest therein, which in the aggregate exceeds in cash value the sum of fifty thousand dollars. For any violation of the provisions of this section, corporations for-

for their corporate rights and powers. On the application of any citizen to a court of competent jurisdiction, such forfeiture may be adjudged and the judgment carries with it cost of proceedings.

1887 R. S. Sec. 2725.

**Section 2210. Proceeding on Termination of Corporation:** Except for the purpose of winding up and settling its affairs, every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this Title.

No dividend of funds must be made on termination of its corporate existence until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or upon the application of a majority in interest of the stockholders, must sell and dispose of any or all real estate of the corporation upon such terms as may be most conducive to the interests of all the stockholders, and must convey the same to the purchaser, and distribute the proceeds among the shareholders or may, at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided, into lots and distributed, by sale for premiums at auction or otherwise, among the shareholders.

1887 R. S. Sec. 2726.

**Section 2211. Payment of Premiums:** Such premiums on lots may be made payable at the time they are bid off, and if not so paid on any lot of land, the directors may immediately offer the same for sale again. If made payable at a future day, and any shareholder fails to pay his bid on the day the same is made due and payable, the directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner provided in the by-laws for the sale of shares on account of delinquent installments and premiums.

1887 R. S. Sec. 2727.

**Section 2212. Financial Report to be Published Annually:** The actual financial condition of all homestead corporations must, by the directors thereof, be published annually in a newspaper published at the principal place of business of the corporation, for four weeks, if published in a weekly, and two weeks if published in a daily. The statement must be made up to the end of each year, and must be verified by the oath of the president and secretary, showing the items of property and liabilities.

1887 R. S. Sec. 2728.

**Section 2213. Publication in Certain Cases:** In any case in which a publication is required, and no newspaper is published at the principal place of business, the publication may be made in a paper published at the capital of the state.

1887 R. S. Sec. 2729.



## CHAPTER LXXXVI.

## INSURANCE CORPORATIONS.

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**Section 2214. Subscriptions to Capital Stock:** After the certificate of incorporation of an insurance company is issued, as provided in Chapter I of this Title, the directors named in the articles of incorporation must proceed in the manner specified, or in their

by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; to levy assessments and installments thereon, and to collect the same, as in this title provided.

1887 R. S. Sec. 2740.

**Section 2215. Limitation on Real Estate Holdings:**

No insurance corporation must purchase, hold or convey real estate, except as hereinafter set forth, to-wit:

First. Such as is requisite for its accommodation in the convenient transaction of its business, not exceeding in value thirty thousand dollars;

Second. Such as is conveyed to it, or to any person for it, by way of mortgage or in trust or otherwise, to secure or provide for the payment of loans previously contracted, or for moneys due;

Third. Such as is purchased at sales upon deeds of trust or judgments obtained or made for such loans or debts;

Fourth. Such as is conveyed to it in satisfaction of debts previously contracted in the course of its dealings; all such real estate, so acquired, which is not requisite for the accommodation of such corporation in the transaction of its business, must be sold and disposed of within five years after such corporation acquired title to the same.

1887 R. S. Sec. 2741.

The general power given to a corporation to acquire, hold and convey property is limited to and can only be exercised to effect the purposes for which it was conferred by the government.—*State v. Commissioners of Marshfield*, 23 N. J. L. 510. But this power can only be enforced by direct proceedings by the state which created the corporation.—*Jones v. Habersham*, 107 U. S. 174. Where a corporation is authorized by its charter to purchase, hold and

convey real estate for its use, subject to the limitation that it shall hold no more than is necessary for its immediate accommodation in transacting business, or such as it may have acquired by sale or otherwise for the purpose of securing debts due it, all real estate so held, may be conveyed for its use.—*Leggett v. N. J. M. & B. Co.* 1 Saxton Ch. 541; 23 Am. Dec. 728. A corporation in taking a mortgage to secure a debt is not dealing in lands.—*Blunt v. Walker*, 11 Wis. 334.

**Section 2216. Policies, by Whom Signed:** All policies made by insurance corporations must be subscribed by the president or vice-president, or in case of the death, absence or disability of those officers, by any two of the directors, and countersigned by the secretary of the corporation. All such policies are as binding and obligatory upon the corporation as if executed over the corporate seal.

1887 R. S. Sec. 2742.

Where the charter of an insurance company provides that "all policies or contracts of insurance" shall be subscribed by the president or some other officer designated by the board of directors for that purpose, the latter provision does not disable the company

from binding itself by contracts for policies and immediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be executed.—*Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345.

**Section 2217. Payment of Dividends:** The directors of every insurance corporation at such times as their by-laws provide, must make, declare and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on capital invested, as to them appears advisable, but the moneys received and



notes taken for premium on risks which are undetermined and outstanding at the time of making the dividend must not be treated as profits nor divided except as provided in this chapter.

1887 R. S. Sec. 2743.

Declaring dividends: See note under Sec. 2106.

**Section 2218. Limitation on Amount of Insurance, Liability of Directors:** If any insurance corporation is under liabilities for losses to an amount equal to its capital stock, and the president or directors, after knowing the same, make any new or further insurance, the estates of all who make such insurance or assent thereto, are severally and jointly liable for the amount of any loss which takes place under such insurance.

1887 R. S. Sec. 2744.

**Section 2219. Capital Stock to be Paid Within Twelve Months:** The entire capital stock of every fire insurance corporation must be paid up in cash within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent. of the whole capital stock is paid up.

1887 R. S. Sec. 2745.

**Section 2220. Must Certify to Capital Stock Paid up:** The president and a majority of the directors must, within thirty days after the payment of the twenty-five per cent. of the capital stock, and also within thirty days after the payment of the last installment or assessment of the capital stock limited and fixed, prepare, subscribe and swear to a certificate setting forth the amount of the fixed capital and the amount thereof paid up at the times respectively in this section named, and file the same in the office of the county recorder of the county where the principal place of business of the corporation is located.

1887 R. S. Sec. 2746.

**Section 2221. Property Which May be Insured:** Every corporation formed for fire insurance may make insurance on all insurable interests within the scope of its articles of incorporation, and may cause itself to be re-insured.

1887 R. S. Sec. 2747.

**INSURABLE INTEREST:** A person has an insurable interest in property if he will suffer pecuniary loss by its destruction.—*Wainer v. Milford M. F. Ins. Co.* 153 Mass. 335, 26 N. E. 877. In property in respect to which he has a partly executed oral contract for conveyance to him.—*Id.* In the property of a corporation, although that interest does not amount to an estate, either legal or equitable in the property insured.—*Riggs v. Comm. Ins. Co.* 125 N. Y. 7, 25 N. E. 1058. In property against which he holds a claim for the payment of encumbrances or debts, though the claim is barred by the statute of limitations.—

*Hartford Fire Ins. Co. v. Haas*, 87 Ky. 531, 2 L. R. A. 64, 9 S. W. 720. In mortgaged property, by a mortgagor before the expiration of the period of redemption.—*Essex Savings Bank v. Meriden F. Ins. Co.* 57 Conn. 335, 4 L. R. A. 759, 17 Atl. 930, 18 Atl. 324. In a barge by one who has it in his custody and possession.—*Murdock v. Franklin Ins. Co.* (W. Va.), 7 L. R. A. 572, 10 S. E. 777. In a building belonging to an estate of a deceased debtor by a simple contract creditor which building may be subject to his debt because the personal property is insufficient to pay the debts of the estate.—*Creed v. Sun Fire Office* (Ala.), 23 L. R. A. 177, 14 So. 323. In the entire partnership stock

of one partner who in case of loss must account to the firm for such sums as he receives under the policy.—*Manhattan Ins. Co. v. Webster*, 98 Am. Dec. 332. In property sold where the vendor has not parted with all of his interest in the property.—*Norcross v. Ins. Cos.* 55 Am. Dec. 571. In property purchased by a purchaser who is in possession, before conveyance, and he may recover upon a total loss notwithstanding a previous policy taken out by his vendor upon the same property. *Aetna F. Ins. Co. v. Tyler*, 30 Am. Dec. 90; *Franklin Fire Ins. Co. v. Martin*, 29 Am. Rep. 271. In real property where a title bond therefor has been assigned to the assured, and the obligee in such bond has made valuable improvements on such property.—*Ayres v. Hartford Fire Ins. Co.* 85 Am. Dec. 553. In property upon which the insured holds a mechanic's lien.—*Stout v. State Fire Ins. Co.* 75 Am. Dec. 539.

As to insurable interest in the rights of a mortgagor under insurance of mortgaged property, see extensive note, 54 Am. Dec. 693-700.

**REINSURANCE:** Insurers have no insurable interest in the property insured by them, regarded in the light of owners, and therefore can have no action on a policy of double insurance made for the benefit of whom it may concern.—*Alliance Marine Ins. Co. v. Louisiana State Ins. Co.* 28 Am. Dec. 117. The insurer who has insured his risks with another insurer has power to assent to the transfer of one his policies according to its provisions in the absence of anything in the contract of reinsurance depriving him of such power.—*Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.* 153 Mass. 63, 36 N. E. 244. A reinsurer may be required to pay the amount of the loss for which it is liable directly to the insured or to the party ultimately entitled to the money when the company reinsured has become insolvent.—*Hunt v. N. H. Fire Underwriters Ass'n. (N. H.)*, 38 L. R. A. 38 Atl. 145. An agreement to issue a policy of reinsurance in the

usual form and for the usual premium made after the property was destroyed, of which both parties were ignorant, would not become operative by relating back to the beginning of the original insurance, but will be deemed to commence at the day of the contract.—*Union Ins. Co. v. American Fire Ins. Co.* 107 Cal. 327, 28 L. R. A. 692, 40 Pac. 431. Where a two thousand dollar policy of reinsurance provided that a loss on a six thousand dollar original insurance should be payable "pro rata, at the same time and in the same manner as the reinsured company," and a loss happened for which the reinsured had to pay \$600, held, that it could only recover \$200 of the reinsurer.—*Ill. Ins. Co. v. Andes Ins. Co.* 16 Am. 620.

**VACANT AND UNOCCUPIED CLAUSE:** A policy of fire insurance on a flouring mill of the plaintiff The Bellevue Roller Mill Company, dated September 9, 1893, for one year provided as follows "This policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the subject of the insurance be a manufacturing establishment, and cease to operate for more than ten consecutive days." It appeared that said mill was compelled to suspend operations during a portion of each year because of the water freezing in the mill race which conducted it to the mill, and that the agent of the insurance company, knowing this fact, had granted repeated renewals of the insurance of said mill for periods of one year, and that on the 9th of September, 1893, the policy sued on was issued as a renewal, for one year, of a former policy, without written application, and received the premium thereof. On December 9th, 1893, the mill closed down, and so remained until May 10, 1894, when the loss occurred. Held, that under the facts of the case, the insurance company had waived the provisions of the policy above quoted.—*Bellevue Roller Mill Co. et al. v. London & L. Fire Ins. Co. (Idaho)*, 35 Pac. 196.

**Section 2222. Funds May be Invested, How:** Every fire insurance corporation may, by its board of directors or as the by-laws direct, invest its funds in loans upon real or personal property, or in the purchase of stocks, bonds or other securities, but no loan must be made on the stock of the corporation as security.

1887 R. S. Sec. 2748.

**Section 2223. Risk, Limitation of:** No fire, marine or inland insurance company doing business in this state shall expose itself to any loss on any one risk, to an amount not exceeding ten per



cent. of its paid up capital, unless the excess shall be reinsured by such company in some other solvent insurance company.

1901, 6th Ses. p. 170, Sec. 10.

**Section 2224. Amount to be Reserved Before Making Dividends:** No corporation transacting fire insurance business under the laws of this state, must make any dividends except from profits remaining on hand after retaining unimpaired:

First. The entire subscribed capital stock;

Second. All the premiums received or receivable on outstanding risks;

Third. A sum sufficient to pay all losses reported or in the course of settlement, and all liabilities for expenses and taxes.

1887 R. S. Sec. 2750.

**Section 2325. Capital Stock of Life and Accident Companies:** Every corporation formed with the purpose of mutual insurance on the life or health of persons, or against accidents to persons for life or for any fixed period of time or to purchase and sell annuities, must have a capital stock or assets of not less than one hundred thousand dollars. It must not make any insurance upon any risk or transact any other business as a corporation until its capital stock is fully paid up in cash.

1901, 6th Ses. p. 169, Sec. 6.

**Section 2226. Capital of Foreign Insurance Companies:** It shall be unlawful for any fire, marine, inland, life or health or casualty insurance company, incorporated by or under, or organized pursuant to the laws of any foreign government or any state or territory of the United States, or any person or persons, directly or indirectly, to take any risks or transact any business of fire, marine, inland, life health or casualty insurance in this state, unless possessed of an actual paid up capital or assets of not less than one hundred thousand dollars (\$100,000).

1901, 6th Ses. p. 169, Sec. 7.

**Section 2227. Must Obtain Certificate to do Business:** It shall not be lawful for any person to act within this state as an agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state, or out of it, without first procuring a certificate of authority from the insurance commissioner.

1901, 6th Ses. p. 167, Sec. 1.

**Section 2228. Fire Insurance Risks, by Whom Written, Penalty, Annual Statement:** All fire insurance risks covering in this state must be written in companies authorized to do business in this state, and only through their licensed agents residing or doing business in this state (reinsurance excepted). Any company violating this section will be liable to a fine of one hundred (\$100) dollars, and its license will be revoked for a period of one year. Each annual statement, when filed, must have the certifi-

cate of the president, secretary or manager that this section has not been violated.

1901, 6th Ses. p. 170, Sec. 12.

**Section 2229. Annual Statement Required:** It shall be the duty of the president, or the vice president and secretary of every insurance company doing business in this State, annually, on or before the first day of April of each year, to prepare, under oath, and deposit with the insurance commissioner of this state a full, true and complete statement of the condition of said company on the last day of the month of December preceding.

1901, 6th Ses. p. 167, Sec. 2.

**Section 2230. Same, Contents of:** The annual statement required by the preceding section shall exhibit the following items and facts:

1. The name of the company and where located.
2. The names and residences of the officers of said company doing business in the state.
3. The amount of the capital stock or assets of the company.
4. The amount of capital stock paid up.
5. The property or assets held by the company, viz.: The real estate owned by such company; the amount of cash on hand and deposited in banks to the credit of the company; the amount of cash in hands of agents; the amount of cash in course of transmission; the amount of loans secured by first mortgage on real estate, with the rate of interest thereon; the amount of all bonds and other loans, the rate of interest thereon; all other securities, their description and value.
6. The liabilities of such company, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense and the cause thereof; losses resisted and in litigation; the amounts due banks or other creditors; the amount of money borrowed by the company; the rate of interest thereon and how secured; the net value of all policies in force, circulated as per the combined experience table of mortality, at 4 per cent interest, and all other claims against the company, describing the same.
7. Net surplus over all liabilities.
8. The income of the company during the preceding year, stating the amount received for premiums, specifying separately health, life, fire, marine or inland premiums, deducting reinsurance; the amount received for interest and from all other sources.
9. The expenditures during the preceding year, specifying the amount of losses paid during said term; the amount paid for return premiums.
10. The amount of risk written during the preceding year.

1901, 6th Ses. p. 167, Sec. 3.

**Section 2231. Company to File By-Laws and Names of Officers:** Each life, health, fire, marine, inland or casualty insurance company shall file with the insurance commissioner its acts of in-



corporation and all amendments thereto, and a copy of its by-laws, together with the names and residence of each of its officers and directors, all of which shall be certified under the hand of the president and secretary of such company.

1901, 6th Ses. p. 168, Sec. 4.

**Section 2232. Company to Designate Agent Within the State:** Any insurance company not incorporated or organized under the laws of this state, desiring to transact business in this state, shall file with the insurance commissioner of this state a written instrument of power of attorney, duly signed and sealed, appointing and authorizing some person who shall be a resident of this state, to acknowledge or receive service of process, and upon whom process may be served for and in behalf of such company in all proceedings that may be instituted against such company in any court of this State, or any court of the United States in this State, and consenting that service of process upon any agent or attorney appointed to accept service under the provisions of this section shall be taken and held to be as valid as if served upon the company, and such instrument shall further provide that the authority of such attorney shall continue until revocation of his appointment is made by such company by filing a similar instrument with the said insurance commissioner, whereby another person shall be appointed as such attorney.

1901, 6th Ses. p. 168, Sec. 5.

**Section 2233. To File Statement and Pay Annual Tax:** All insurance companies now doing business in this State, or that may hereinafter do business in this State, under the provisions of this chapter must file with the insurance commissioner annually, on or before the fifteenth day of April of each year, a statement under oath stating the amount of all premiums received by said company during the year ending December 31st preceding in this State, and the amount actually paid policy holders during the same time, and shall pay into the State treasury a tax of two per centum on all such premiums collected, less the amount of all losses actually paid policy holders, and premiums returned. The commissioner shall file such verified statement and schedule in his office and certify the amount of gross receipts, less amounts of losses actually paid policy holders and premiums returned as aforesaid to the State treasurer. Within thirty days thereafter such insurance company shall pay or cause to be paid into the State treasury a tax of two per centum, or two per centum upon all such gross receipts, less such amounts of losses actually paid policy holders and premiums returned in the State of Idaho, which payment, when made, shall be in lieu of all taxes upon the personal property of such company, and the shares or stock or assets therein. Any organization failing or refusing to render such statement and to pay the required tax of two per centum thereon for more than thirty days after the time so specified shall be liable to a fine of one hundred dollars for each additional day of delinquency, and the taxes may be collected by restraint and a fine recovered by an action to be instituted by the attorney general in the name of the State in any court of competent jurisdiction,

and the commissioner shall revoke the license and authority of such delinquent company until such payment of taxes and fine, should any be imposed, is fully paid and notice thereof is given to the insurance commissioners: *Provided*, That all real property, if any, of such company, shall be listed, assessed and taxed the same as real property of like character of individuals by said company.

1901, 6th Ses. p. 170, Sec. 13.

**Section 2234. Fees for Annual License, Filing, Etc.:** The commissioner shall collect from each accident, health, fire, marine, inland, casualty or fidelity company, transacting business in this State on annual license of fifty dollars; for filing certified copies of its articles of incorporation, ten dollars; for filing annual statement, ten dollars; for each agent's certificate of authority, three dollars; license fire agents, three dollars; said fire agent's certificates transferable to successors in office for unexpired term, for each life insurance company an annual license of fifty dollars; for filing a certified copy of its articles of incorporation, ten dollars; for filing each annual statement, ten dollars; for each agent's certificate of authority, five dollars; payable at the time of filing the first statement, and, with the exception of fee for filing articles of incorporation, annually thereafter at the time of filing the annual statement in April of each year, and before he shall issue his certificate of authority. Blank licenses shall be issued and signed by the State auditor to the insurance commissioner from time to time, as required, and charged to him. The insurance commissioner shall make monthly reports on the first of each month to the auditor of the number of licenses issued by him. The money derived from the sale of licenses and for filing or other fees under this chapter shall be paid into the general fund of the State.

1901, 6th Ses. p. 171, Sec. 14.

**Section 2235. Unearned Premiums to be Returned:** In the event of the total destruction of any insured property, on which the amount or agreed loss shall be less than the total amount insured thereon, the insuring company or companies shall return to the insured, the unearned insurance premium for the excess of the insurance over the appraised or agreed loss, to be paid at the same time and in the same manner as the loss shall be paid.

1901, 6th Ses. p. 170, Sec. 11.

**Section 2236. Commissioner to Examine Into Soundness of Company:** The insurance commissioner may address inquiries to any insurance corporation or association doing business in this State or any officer thereof in relation to its doings or conditions or any other matter connected with its transactions; and it shall be the duty of every corporation or officer so addressed to properly reply, in writing, to such inquiries; and whenever he shall deem it expedient so to do, or when five responsible persons shall file with him written charges against any such corporation alleging that any statement or return filed by it with such commission is false or that its affairs are in an unsound condition, he shall, in person, or by some one to be ap-



pointed by him for that purpose, not an officer or agent of, or in any manner interested in any insurance corporation doing business in this State, except as a policy holder, examine into its affairs and conditions; and it shall be the duty of the corporations, its officers or agent to cause its books to be opened for inspection, and to pay all reasonable expense of and compensation for such examination upon the certificate and the requisition therefor of said commissioner, which expense, however, shall not exceed five dollars a day during the time of the examination, and five cents per mile for traveling by the most direct route in going and coming from the place where such examination took place; but no corporation examined shall, directly or indirectly, pay, by way of gift, gratuity or otherwise, any other or further sum to said commissioner or examiner for services, extra services or for purposes of legislation or on any other pretenses whatever.

Any commissioner, examiner, officer, clerk or employe of any insurance company violating any provision of this section shall be guilty of a misdemeanor. Whenever it shall appear to the commissioner from his own examination or report of the person appointed by him that the condition of any company examined is unsound, he shall revoke the certificate granted such company, and cause a notification thereof to be published in a daily paper at the capital, and mail a copy thereof to each agent of the company, and the agent or agents thereof, after such notice, shall be required to discontinue doing business for such company. The commissioner shall, in like manner, and upon like conditions, examine insurance corporations applying for admission to transact business in this State, and if the affairs or conditions of any such corporation do not fully meet the requirements of the law, he shall withhold his certificate: *Provided, however,* That a certificate from the insurance commissioner of any State who has recently examined the affairs of said company shall be accepted as evidence as to the conditions of the company.

1901, 6th Ses. p. 173, Sec. 17.

**Section 2237. Transacting Insurance Business Without Certificate, Penalty:** Any person or agent transacting an insurance business without the certificate herein required, or after such certificates shall have been withdrawn or revoked, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months or by both such fine and imprisonment.

1901, 6th Ses. p. 174, Sec. 18.

**Section 2238. Discriminations Prohibited:** No life insurance corporation or company subject to the provisions of this chapter shall make any discriminations in favor of individuals of the same class or of the same expectation of life, either in the amount of premiums charged or in any return of premiums, dividends or other advantages. No agent or such corporation shall make any contract for insurance or agreement as to such contract other than that which is plainly expressed in the policy issued. No such corporation or agent thereof shall pay or allow, or offer to pay or allow, as an inducement

to any person to insure any rebate of premium or any special favor or advantage whatever in the dividends to accrue thereon, or any inducement whatever not specified in the policy. If it shall appear to the satisfaction of the insurance commissioner, after a hearing by him upon due notice, that any corporation is issuing policies or making contracts that are in violation of this section, he shall, upon the written approval of the attorney general, require such corporation and its officers and agents to refrain, within ten days, from making any such policy or contract. If any such corporation or officer or agent thereof shall fail to comply with the provisions of this section, the insurance commissioner shall institute such proceedings at law as may be necessary to restrain such violation of this section.

1901, 6th Ses. p. 174, Sec. 19.

**Section 2239. Statement of Condition to be Published:** Every company, corporation, association or society transacting the business of life insurance within the State of Idaho shall publish, or cause to be published, as soon after the first of January and prior to the first of April in some paper published in the capital, a statement showing the exact conditions of its affairs on the last day of the month of December preceding.

1901, 6th Ses. p. 125, Sec. 20, last part.

#### ASSESSMENT OR NATURAL PREMIUM INSURANCE.

**Section 2240. Assets to be not Less than \$100,000; Certificate, Etc.:** Companies or associations organized under the laws of any other state of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of the sum of not less than one hundred thousand dollars, invested as required by the laws of this State, regulating other insurance companies, shall be licensed by the insurance commissioner to do business in this State and be subject only to the provisions of this chapter: *Provided, however,* That such company or association shall first file with the commissioner a certified copy of its charter, a written agreement appointing the insurance commissioner and his successor in office to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it may be served; certificate under oath of its president and secretary that it is paying and for the twelve months next preceding has paid the maximum amount named in its policies or certificates in full; a statement under oath of its president and secretary of its business for the year ending December 31, preceding; a certified copy of its constitution and by-laws, and a copy of its policy and application; a certificate from the proper authority in its home State that said company or association is legally entitled to do business in such home State, and has at least one hundred thousand dollars surplus assets subject to its indebtedness. It shall be the duty of the insurance commissioner to issue to any company or association complying with the provisions of this chapter, and every such company or association shall annually thereafter, before such license is renewed, file with the insurance commissioner, on or



before the first day of May, a statement under oath of its president and secretary, or like officers, of its business ending December 31st of the year preceding.

1901, 6th Ses. p. 172, Sec. 15.

**Section 2241. Fees:** Every such company or association shall pay to the insurance commissioner, for the use of the State, the following fees: For filing copy of its charter, ten dollars; for filing statement preliminary to its admission, ten dollars; for filing each annual statement after admission, ten dollars; and for each agent's certificate of authority, three dollars.

1901, 6th Ses. p. 172, Sec. 16.

**Section 2242. Words "Assessment Plan" to be Printed on Policy, Examination:** Every policy or certificate issued to a resident of the State of Idaho by any corporation therein transacting the business of life insurance upon the assessment plan, or admitted into this State under the laws of Idaho, shall print in bold type (in red ink) in every policy or certificate issued upon the life or lives of the citizens of Idaho, making one of the principal lines near the top thereof the words "Issued upon the assessment plan," and the words "assessment plan" shall be conspicuously (in red ink) in or upon every application, circular, card, advertisement and other printed documents issued, circulated or caused to be circulated by such corporation within this State. No association or society shall be admitted or permitted to do business within the State of Idaho if it shall appear to the satisfaction of the insurance commissioner, after examination or other evidence, that its assets or capital stock, or membership is seriously impaired or decreasing.

1901, 6th Ses. p. 174, Sec. 20, first part.

**Section 2243. Notice of Assessment, What Must State:** Each notice of assessment made by any corporation, association or society transacting the business of life, endowment or casualty insurance upon the co-operative or assessment plan made upon its members or any of them, shall truly state the cause and purpose of such assessment.

1889, 15th Ses. p. 8, Sec. 3.

#### GENERAL PROVISIONS.

**Section 2244. Suits, Where Instituted:** Suits may be instituted and prosecuted against any fire, marine, inland, life or health insurance company in any county where loss occurs, or where the policy holder instituting such suit resides, and the process in any such suit may be served upon any person in this State holding a power of attorney for such company.

1901, 6th Ses. p. 169, Sec. 8.

**Section 2245. Failure to Pay Judgment Against, Certificate Revoked:** Should any life, health, fire marine or inland insurance company fail to pay off and satisfy any execution that may lawfully issue or any final judgment against said company within

thirty days after the officer holding such execution has demanded payment thereof from the duly authorized officer, agent or attorney of such company in this State or out of it, such officer shall immediately certify such demand and failure to the insurance commissioner, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this State until said execution shall be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company.

1901, 6th Ses. p. 169, Sec. 9.

#### FRATERNAL BENEFICIARY ASSOCIATIONS.

**Section 2246. Fraternal Beneficiary Association, What is; Government of; Benefit Fund; Benefits; to be Paid to Whom:**

A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each association shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of benefits in case of death, and may make provisions for the payment of benefits in case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age: *Provided*, That the period in life at which payment of physical disability benefits on account of old age commences, and shall not be under seventy (70) years, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed shall be derived from assessments or dues collected from its members. Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or persons dependent upon the member. Such associations shall be governed by this chapter and shall be exempt from the provisions of the insurance laws of this State and shall not pay a corporation or other tax, and no law hereinafter passed shall apply to them unless they be expressly designated therein. And such fraternal beneficial association may create, maintain, disburse and apply reserve or emergency funds in accordance with its constitution or by-laws.

1901, 6th Ses. p. 175, Sec. 1.

**Section 2247. Associations Already Formed, to Comply:** All such associations coming within the description as set forth in the preceding section, organized under the laws of this or any other State, province or territory, and now doing business in this State, may continue such business: *Provided*, That they hereafter comply with the provisions of this chapter regulating annual reports and the designation of the commissioner of insurance as the person upon whom process may be served, as hereinbefore provided.

1901, 6th Ses. p. 176, Sec. 2.



**Section 2248. Foreign Associations:** Any such association organized under the laws of any other State, Province or Territory and now doing business in this State, shall be admitted to do business within this State, when it shall have filed with the commissioner of insurance a duly certified copy of its charter and articles of association and a copy of its constitution or laws, certified to by its secretary or corresponding officer, together with an appointment of the commissioner of insurance of this State as a person upon whom process shall be served as hereinafter provided: *And, provided,* That such association shall be shown to be authorized to do business in the State, Province or Territory in which it is incorporated or organized, in case the laws of such State, Province or Territory shall provide for such authorization; and in case the laws of such State, Province or Territory do not provide for any formal authorization to do business on the part of any such association, then such association shall be shown to be conducting its business within the provisions of this chapter, for which purpose the commissioner of insurance of this State may personally or by some person to be designated by him, examine into the condition of affairs, character and business methods, accounts, books and investments of such association at its home office, which examination shall be at the expense of such association, and shall be made within thirty days after demand thereof, and the expense of such examination shall be limited to fifty dollars: *Provided,* Such person appointed to examine into the affairs of any fraternal beneficiary association shall not be a member of, or in any wise connected with, said fraternal beneficiary association.

1901, 6th Ses. p. 176, Sec. 3.

**Section 2249. Fraternal Beneficiary Association to Make Reports; Contents:** Every such association doing business in this State shall, on or before the first day of March of each year, make and file with the commissioner of insurance of this State a report of its affairs and operations during the year ending on the 31st day of December immediately preceding, which annual report shall be in lieu of all other reports required by any other law. Such report shall be upon blank forms to be provided by the commissioner of insurance, or may be printed in pamphlet form, and shall be verified, under oath, by the duly authorized officers of such association, and shall be published, or the substance thereof, in the annual report of the commissioner of insurance under a separate part entitled "Fraternal beneficiary association" and shall contain answers to the following questions:

1. Number of certificates issued during the year, or members admitted.
2. Amount indemnity effected thereby.
3. Number of losses or benefit liabilities incurred.
4. Number of losses or benefit liabilities paid.
5. The amount received from each assessment for the year.

6. Total amount paid members, beneficiaries, legal representatives or heirs.

7. Number and kind of claims for which assessments have been made.

8. Number and kind of claims comprised or resisted and brief statement of reasons.

9. Does association charge annual or periodical dues or admission fee?

10. How much on each one thousand dollars, annually or per capita, as the case may be?

11. Total amount received, from what source, and the disposition thereof.

12. Total amount of salaries paid to officers.

13. Does association guarantee in its certificate fixed amount to be paid regardless of amount realized from assessments, dues, admission fees and donations?

14. If so, state amount guaranteed, and the security of such guarantee.

15. Has the association a reserve or emergency fund?

16. If so, how is it created and for what purpose, the amount thereof, and how invested?

17. Has the association more than one class?

18. If so, how many, and the amount of indemnity in each?

19. Number of members in each class.

20. If voluntary, so state and give date of organization.

21. If organized under the laws of this State, under what law and at what time; giving chapter and year and date of passage of the act?

22. If organized under the laws of any other State, Province or Territory, state such fact and date of organization, giving chapter and year and date of passage of the act.

23. Number of certificate of beneficiary membership lapsed during the year.

24. Number in force at the beginning and end of year; if more than one class number in each class.

25. Names and addresses of its presidents, secretary and treasurer, or corresponding officer.

The commissioner of insurance is authorized and empowered to address any additional inquiries to any such association in relation to the matter embraced in such report, and such officers of such association as the commissioner of insurance may require shall promptly reply in writing, under oath, to all such inquiries.

1901, 6th Ses. p. 177, Sec. 4.

**Section 2250. Service of Process on Fraternal Beneficiary Association:** Each association now doing or hereafter admitted to do business within this State, not having its principal office in this State, and not having organized under the laws of this State, shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorneys and upon whom all lawful process in any action or proceeding against



it may be served, and in such writing shall agree that any lawful process against it, which is served on said attorney shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this State. Copies of such certificate, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service upon such attorney shall be deemed sufficient service upon such association. When legal process against any such association is served upon said commissioner of insurance, he shall immediately notify the association of such service by letter, prepaid and directed to its secretary or corresponding officer, and shall, within two days after such service, forward in the same manner a copy of the process served on him to such officer. The plaintiff in such process so served shall pay the commissioner of insurance at the time of such service a fee of three dollars, which shall be recovered by him as part of the taxable costs, if he prevails in the suit. The commissioner of insurance shall keep a record of all process served upon him, which record shall show the day and hour when such service was made and by whom made.

1901, 6th Ses. p. 178, Sec. 5.

**Section 2251. Permit to do Business; How Obtained:**

The commissioner of insurance of this State shall, upon the application of any association having the right to do business within this State, as provided by this chapter, issue to such association a permit, in writing, authorizing such association to do business within this State, for which certificate and all proceedings in connection therewith such association shall pay to said commissioner of insurance the fee of five dollars.

1901, 6th Ses. p. 179, Sec. 6.

**Section 2252. How Incorporated:** Fraternal beneficial associations shall be incorporated in manner as now is or may be hereinafter provided by law.

1901, 6th Ses. p. 179, Sec. 7.

**Section 2253. Association Shall not Employ Agents, When:** Such association shall not employ paid agents in soliciting or procuring members except in the organization or building up subordinate bodies or granting members inducements to procure new members.

1901, 6th Ses. p. 179, Sec. 8.

**Section 2254. Contract of Beneficiary to Pay Dues, Effect of:** No contract between a member and his beneficiary and the beneficiary, or any person for him, by which said beneficiary or any person for him, shall pay such member's assessments and dues, or either of them, shall give the beneficiary a vested right in the benefit certificate or in the benefit or deprive the member of the right to change the name of the beneficiary, or revoke the certificate, if any issued by the association: *Provided*, That such change or revocation

be done by written or printed notice to the association in the manner and form provided for by law.

1901, 6th Ses. p. 180, Sec. 9.

**Section 2255. Benefits not Liable to Attachments, Execution of Other Process, Etc.:** The money or other benefit, charity, relief or aid already paid or to be paid, provided or rendered by any association authorized to do business under this chapter, shall not be liable to attachment or execution by trustee, garnishee or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, or by the operation of law, to pay any debt or liability of a certificate holder or any beneficiary named in the certificate, or any person who may have rights thereunder.

1901, 6th Ses. p. 180, Sec. 10.

**Section 2256. May Provide for Meetings of Legislative Body in any Other State. Vote of Subordinate Bodies in Other States:** Any such association organized under the laws of this state may provide for the meeting of its legislative or governing body in any other state, province or territory wherein such association shall have subordinate bodies, and all business transacted at such meetings shall be valid in all respects, as if such meetings were held within this state, and when the laws of any such association provide for the election of its officers by votes to be cast in its subordinate bodies the vote so cast in the subordinate bodies in any other state, province or territory, shall be valid as if cast within this state.

1901, 6th Ses. p. 180, Sec. 11.

**Section 2257. Penalty for False and Fraudulent Statements:** Any person, officer, member or examining physician who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining any money or benefit in any association transacting business under this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both, in the discretion of the court, and any person who shall wilfully make any false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such association for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement, in any verified report or declaration, under oath required or authorized by this chapter, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statute of this state.

1901, 6th Ses. p. 180, Sec. 12.

**Section 2258. Penalty for Refusing or Neglecting to Make Report—Duty of Commissioner of Insurance—Injunction, Etc:** Any such association refusing or neglecting to make



the report, as provided in this chapter, or to appoint the commissioner of insurance as its true and lawful attorney for the purpose of this chapter, shall be excluded from doing business within this state. Said commissioner of insurance must, within sixty days after failure to make such report, or in any case any such association shall exceed its power, or conduct its business fraudulently, or shall fail to comply with any of the provisions of this chapter give notice, in writing, to the attorney general, who shall immediately commence an action against any such association to enjoin the same from carrying on any business. And no injunction against such association shall be granted by any court, except on the application of the attorney general at the request of the commissioner of insurance. No such association so enjoined shall have authority to continue to do business until such report shall be made, or overt act or violation complained of shall have been corrected and until the cost of such action be paid by it: *Provided*, The court shall find that such association was in default as charged. Whereupon the commissioner of insurance shall reinstate such association and not until then shall such association be allowed to again do business in this state. Any officer, agent or person acting for any association or subordinate body thereof within this state, while such association shall be enjoined or prohibited from doing business pursuant to this chapter, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not less than twenty-five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

1901, 6th Ses. p. 181, Sec. 13.

**Section 2259. Failing to Comply with Chapter, Agent Guilty of Misdemeanor:** Any person who shall act within this state as an officer, agent or otherwise for any association which shall have failed, neglected or refused to comply with, or shall have violated any of the provisions of this chapter, or shall have failed or neglected to procure from the commissioner of insurance a proper certificate of authority to transact business as provided by this chapter, shall be subject to the penalty provided in the last preceding section for the misdemeanor therein specified.

1901, 6th Ses. p. 182, Sec. 14.

**Section 2260. Fees for Report—Fraternal Beneficiary Association:** Every fraternal beneficiary society to which this chapter is applicable shall pay to the insurance commissioner for filing annual statement as provided by this chapter, twenty-five dollars.

1901, 6th Ses. p. 182, Sec. 15.

**Section 2261. Chapter not Applying to Masons, Odd Fellows, or Similar Orders:** This chapter shall not apply to any grand or subordinate lodge of the order of Free and Accepted Masons, Independent Order of Odd Fellows, as they now exist, nor to similar orders or secret societies, nor to fraternal societies whose subordinate or national bodies pay nothing but funeral or weekly sick

benefits, nor to any organization conducted solely for benevolent and charitable purposes, whose members are employed by one corporation or institution or by more than one similar corporation or institution, or whose membership is confined to one trade, art or profession.

1901, 6th Ses. p. 182, Sec. 16.

#### COUNTY MUTUAL FIRE INSURANCE COMPANIES.

**Section 2262. Who may Organize:** It shall be lawful for any number of persons, not less than twenty-five, residing in any county in this state who, collectively, shall own property not less than twenty-five thousand dollars in value, which they desire to insure, to form themselves into a company for mutual insurance against loss or damage by fire, which corporation shall possess other powers and be subject to other duties of corporations, and the corporate name thereof shall embrace the name of the county in which the business office of the said company shall be located.

1899, 5th Ses. p. 111, Sec. 1; 1891, 1st Ses. p. 167, Sec. 1.

**GENERAL CHARACTERISTICS:** Mutual insurance companies differ essentially from stock insurance companies. They need many by-laws and conditions which are not required in

stock companies and it is necessary and equitable that each person who becomes insured in them should become subject to the same obligations toward his associates as he requires from them toward himself.—*Baxter v. Chelsea Mut. Fire Ins. Co. (Mass.)*, 1 Allen 294.

**Section 2263. May Adopt By-Laws:** Any company so formed may adopt such by-laws for its regulation as are not inconsistent with the provisions of this sub-division, and may therein prescribe the compensation for its officers.

1899, 5th Ses. p. 113, Sec. 13; 1891, 1st Ses. p. 169, Sec. 13.

**Section 2264. Directors and Officers of Company:** Every company so formed shall choose from that number, not to exceed thirteen directors, to manage the affairs of such company, who shall hold their office for one year, or until others are elected and qualified; and such directors shall choose from their number a president, vice-president, secretary and treasurer, and said treasurer and secretary shall give such bond as shall be required by the board of directors of said company.

1899, 5th Ses. p. 111, Sec. 2; 1891, 1st Ses. p. 167, Sec. 2.

**Section 2265. Directors, how Chosen:** The directors of each company shall be chosen annually by ballot, as shall be provided by the by-laws of such company, but each member shall have one vote, and no member shall vote by proxy.

1899, 5th Ses. p. 113, Sec. 11; 1891, 1st Ses. p. 169, Sec. 11.

**Section 2266. Articles and By-laws to be Filed; Must Keep Record of Proceedings:** The directors of such company shall file their articles of incorporation, together with a copy of their by-laws and the names of the officers of such company, in the office of the county auditor of the county in which such company is located, and shall keep a record of their proceedings in a book kept for that purpose, together with the names of all persons having prop-



erty insured, and the amount of property so insured by said person, which record shall be kept open for inspection to all the members in such company at the office of the secretary thereof.

1899, 5th Ses. p. 111, Sec. 3; 1891, 1st Ses. p. 167, Sec. 3.

BOOK OF COMPANY: One insured in a mutual insurance company is a

member thereof and the books of the company are evidence against him as a member of the company.—Diehl v. Adams Co. M. Ins. Co. 58 Pa. St. 443.

**Section 2267. What Property may be Insured:** No company formed under the provisions of this sub-division shall insure any property outside the county in which such organization is formed, nor within the limits of any incorporated town or city, except only warehouses of farmers' organizations, and such other buildings as may be used in connection with the business of agriculture. All farm buildings within the limits of the county, and all other property of the farm subject to damage by fire, may be insured under the provisions of this sub-division.

1899, 5th Ses. p. 113, Sec. 10; 1891 1st Ses. p. 169, Sec. 10.

**Section 2268. May Issue Policies:** The directors of such company may issue policies, signed by the president and secretary, agreeing, in the name of the company, to pay all losses or damage by fire, for a term not exceeding five years, to the holder of such policy, not exceeding the sum named therein.

1899, 5th Ses. p. 112, Sec. 4; 1891, 1st Ses. p. 167, Sec. 4.

**Section 2269. Insured Person must give Undertaking:** Every person insured against loss or damage by fire, shall give his undertaking, bearing even date with the policy so issued to him, binding himself, his heirs and assigns, to pay his pro rata share to the company of all losses or damage by fire which may be sustained by any member thereof. And every such undertaking shall, within five days after the execution thereof, be filed with the secretary in the office of said company, and shall remain on file in said office, except when required to be produced in court as evidence. He shall also, at the time of receiving insurance, pay such percentage in cash, or such reasonable sum named in the policy, as may be required by the rules and by-laws of the company.

1899, 5th Ses. p. 112, Sec. 5; 1891, 1st Ses. p. 167, Sec. 5.

**TRANSFER OF PROPERTY OR POLICY:** On the transfer of property insured in a mutual insurance company, the purchaser does not become liable to assessments in the absence of any assignment of the policy to him or of any contract between him and the former owner creating such liability.—Bowditch Mut. Fire Ins. Co. v. Buffum, 2 Gray, 550, but the assignees of a policy who have been substituted to all the rights of the original assured with the assent of the company, thereby become members of the company and are liable to assessment.—Commonwealth v. Mass. M. F. Ins. Co. 112 Mass. 116.

**PURPOSES:** A mutual insurance company cannot make assessments for prospective losses unless authorized by statute.—Orr v. B. & T. M. Ins. Co. 26 U. C. C. P. 141. A member cannot contest his liability to an assessment on the ground that the loss for which it was made should not have been paid and that actions therefor could have been defeated under the statute of limitations.—Sands v. Hill, 42 Barb. 651. Where a loss has been paid out of money hired by the company without making any assessment therefor, it may properly make an assessment upon the parties whose policies were in force at the time of the loss.—Tobey v. Russell, 9 R. I. 58, but a member is not in default for non-payment of an as-

assessment the notice of which shows on its face that it is largely to meet losses which occurred prior to his membership.—*Susq. M. F. Ins. Co. v. Tunk-*

*hannock Toy Co.* 15 W. N. C. 306; *Long Pond M. F. Ins. Co. v. Houghton*, 6 Gray, 77.

**Section 2270. Notice and Adjustment of Loss:** Every member of such company who sustains loss by fire shall immediately notify the secretary of said company, or, in case of his absence, the president thereof, specifying the property destroyed, the damage and cause thereof, which officer shall forthwith ascertain and adjust the amount of such loss or damage, or who shall forthwith convene the directors of such company, whose duty it shall be to appoint a committee of not more than three members of said company to ascertain the amount of such loss; and in case of the inability of the parties to agree upon the amount of such damage the claimant shall choose a disinterested party, and the company shall choose a disinterested party who shall constitute a board of arbitration to settle such loss; and in case these parties cannot agree they shall choose a third party to act with them, and said board of arbitration shall have power to examine witnesses and determine all matters in dispute, and the decision of said board shall be final.

1899, 5th Ses. p. 112, Sec. 6; 1891, 1st Ses. p. 168, Sec. 6.

**Section 2271. May Classify Risks, When Assessments May be Made:** The company, under the provisions of this division, may classify property insured at the time of issuing the policy thereon under different rates, corresponding as nearly as may be to the greater or less risk from fire or loss which may attach to each several building or personal property insured. Whenever the amount of any loss shall be ascertained, and there are not sufficient funds in the treasury to pay such loss or damage, the president or secretary shall convene the directors of said company, who shall make assessments on the property insured, taking in connection the rate of premium under which it may have been classified.

1899, 5th Ses. p. 112, Sec. 7; 1891, 1st Ses. p. 168, Sec. 7.

**Section 2272. Notice of Assessment; Time of Payment:** It shall be the duty of the secretary, whenever such assessments shall have been completed; to notify every person composing such company, by letter sent to his postoffice address, of the amount of such loss, and the sum due from him as his share thereof, and the time when and to whom such payment is to be made, and such time shall not be less than thirty days nor more than sixty days from the time of such notice.

1899, 5th Ses. p. 112, Sec. 8; 1891, 1st Ses. p. 168, Sec. 8.

**REQUISITES OF THE NOTICE:** A notice of assessment before the assessment is complete is inoperative.—*Bangs v. McIntosh*, 23 Barb. 591, and such notice must give a member information from which he can tell what he is required to pay.—*Id.* So, a notice

of assessment mailed on the twelfth and requesting payment on the twenty-fourth of the same month, when the statute required notice to be given thirty days before the time of payment, was held insufficient.—*Frey v. Wellington M. Ins. Co.* 4 Ont. App. Rep. 293.

**Section 2273. May Sue for Assessments. Neglect of Duty:** Suits at law may be brought against any member of such



company who shall refuse or neglect to pay any assessment made upon him by the provisions of this sub-division, and any director of such company so formed who shall wilfully neglect to perform the duties imposed upon him under the foregoing sections shall be personally liable to the individual sustaining such loss.

1899, 5th Ses. p. 112, Sec. 9; 1891, 1st Ses. p. 169, Sec. 9.

**RIGHT OF ACTION:** An action after the expiration of a policy to recover assessments against a member of a mutual insurance company is not such a final determination of his lia-

bility as to preclude a subsequent action for other assessments to pay losses not adjusted at the time of the prior action, but which occurred during the life of his policy.—*Susq. M. F. Ins. Co. v. Mardoff*, 23 Pitts. L. J. N. S. 231.

**Section 2274. Annual Statement by Secretary:** It shall be the duty of the secretary of each company, immediately preceding the annual election, to prepare a statement, which shall be a complete report of the amount insured, the number of policies issued, and to whom, and all other matters pertaining to the business of such companies, which statement shall be reported to the board of directors and subject to examination by any member of said organization.

1899, 5th Ses. p. 113, Sec. 12; 1891, 1st Ses. p. 169, Sec. 12.

## CHAPTER LXXXVII.

### RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.

#### Section.

2275. How formed. Number of directors.

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#### Section.

CHURCHES AND RELIGIOUS SOCIETIES AS CORPORATIONS SOLE.

2282. Such corporations may be formed.

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2285. Persons filing articles shall become a corporation sole.

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2288. Instruments, how signed and executed.

#### **Section 2275. How Formed. Number of Directors:**

Any number of persons associated together for any purpose, where pecuniary profit is not their object, may, in accordance with the rules, regulations or discipline of such association, elect directors, the number thereof to be not less than three nor more than eleven, and may incorporate themselves as provided in this title.

1887 R. S. Sec. 2760.

**RULES AND REGULATIONS:** A voluntary religious association in churches organized to assist in the expression and dissemination of religious doctrines made by their governing bodies, prescribed rules and regulations for their church government and discipline, and such rules and regulations will be obligatory upon the members of the congregation and officers of

such general associations and will be given effect by the civil courts.—*First Presbyterian Church of Perry v. Myers* (Okl.), 50 Pac. 70.

**PRESUMPTION OF INCORPORATION:** The incorporation of a church society cannot be presumed merely because the statute prescribed the mode by which such society may be incorporated.—*Alden v. St. Peter's Parish*, 158 Ill. 631, 42 N. E. 392.

**Seciton 2276. What Articles of Incorporation Must State:** In addition to the requirements of chapter LXXX the articles of incorporation of any such association must set forth the holding of the election for directors, the time and place where the same was held, that a majority of the members of such association were present and voted at such election, and the result thereof; which facts must be verified by the officers conducting the election.

1887 R. S. Sec. 2761.

**Section 2277. What By-Laws May Provide for:** Corporations organized for purposes other than for profit may in their by-laws, ordinances, constitutions, or articles of incorporation, in addition to the provisions of chapter LXXX provide for.

First. The qualification of members, mode of election, and terms of admission to membership;

Second. The fees of admission and dues to be paid to their treasury by members;

Third. The expulsion and suspension of members for misconduct or non-payment of dues; also, for restoration to membership;

Fourth. Contracting, securing, paying, and limiting the amount of their indebtedness;

Fifth. Other regulations not repugnant to the laws of the state and consonant with the objects of the corporation.

1887 R. S. Sec. 2765.

**ELECTIONS:** An election of vestrymen of an Episcopal parish not held on the day required by the canon and of which notice is not given during usual divine service as required by the canon, but at an earlier service is void.—*Dahl v. Palache* (Cal.), 9 Pac. 94.

**EXPULSION:** A by-law of a religious society provided that any member should be dropped from the list who had ceased to worship regularly with the society or had failed to contribute

to the support of its worship for one year, held, that nevertheless, the member could only be expelled by a vote of the society and after a hearing.—*Gray v. Christian Society*, 137 Mass. 329.

**RECOGNITION BY CIVIL COURTS:** The law of an ecclesiastical body will be enforced by the civil courts when not in conflict with the constitution and laws of the state.—*Krecker v. Shirey*, 163 Pa. 534, 30 Atl. 440; *First Presbyterian Church v. Myers* (Okl.), 38 L. R. A. 687, 50 Pac. 70.

**Section 2278. May Hold Property:** All such corporations may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the association.

1887 R. S. Sec. 2762.

**CONTROL AND USE OF LAND:** Land deeded to trustees of a church society will, on the society becoming incorporated, and a church edifice being erected thereon and used for religious services be deemed by presumption to be in the possession of the corporation though control is not assumed by any formal act or resolution.—*Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2. A church and school belonging to a religious corporation were for eight months entirely in

charge of the priest who collected and disbursed the funds, the trustees holding no meetings and taking no part in the arrangements. The priest borrowed money to build an addition to the school, the trustees knew that the addition was being built and that the corporation was without funds and retained the building so erected, held, that the corporation was liable for the borrowed money.—*Roman Catholic Congregation of the Church of the Annunciation v. O'Leary* (Colo.), 49 Pac. 422.



**Section 2279. Masons, Odd Fellows, Etc., May Hold Property:** In addition to that provided for in the preceding section, Masons, Odd Fellows, and Pioneer incorporated associations may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith.

1887 R. S. Sec. 2763.

**Section 2280. May Mortgage or Sell Real Property:** Religious, social and benevolent corporations, through their directors or trustees, may mortgage or sell real property held by them whenever a majority of the members of the said corporation may so direct by their vote: *Provided*, That notice of the intended vote on the proposition be published in three newspapers of general circulation at least once in each of the three weeks immediately preceding the vote: *Provided*, The newspaper shall be published in the county in which the said real property is located or in the judicial district in which the property is located if there be not three newspapers published in the county.

1887 R. S. Sec. 2764, amended 1899, 5th Ses. p. 436.

When a benevolent corporation has entered into a usurious contract, borrowing money and securing the payment of the same by a mortgage on its real property, and it being shown that the mortgagor has paid to the mortgagee the principal sum borrowed; the mortgagor can maintain a suit in equity to have the mortgage cancelled as a cloud upon his title. Such corporations have no power to enter into

such contracts.—*Portneuf, etc. v. Western Loan & Savings Co.* 59 Pac. 362.

Under the provisions of Section 2764 Rev. St. before it was put in its present form (as above) by the amendment of the act of March 6, 1899, a benevolent corporation could not legally incur or sell its real property without first obtaining an order for that purpose of the district court of the county in which such real property is situated.—*Portneuf Lodge, etc. v. Western Loan & Savings Co.* 59 Pac. 362.

**Section 2281. May be Formed for Purpose of Paying Death Benefit:** Associations may be formed for the purpose of paying to the nominee of any member, a sum upon the death of said member not exceeding three dollars for each member of such association. No such association must exceed in number one thousand persons. It may, upon the death of each member, levy an assessment upon each member living at the time of the death, not exceeding three dollars for each member, and collect the same, and pay the same to the nominee of such deceased; and may also provide the payment of such annual payments of members as may be deemed best. Such annual assessment upon any one member not to be raised above the annual assessment established at the time such member joined such association. Such association, by its name, may sue and be sued, and may loan such funds as it may have on hand, and may own sufficient real estate for its business purposes, and such other real estate as it may be necessary to purchase on foreclosure of its mortgages: *Provided*, Such real estate so obtained through foreclosure shall be sold and conveyed within five years from the day title is obtained, unless the district court of the proper district shall, upon petition and good cause shown, extend the time.

1887 R. S. Sec. 2766.

## CHURCH AND RELIGIOUS SOCIETIES AS CORPORATIONS SOLE.

**Section 2282. Such Corporations May be Formed:**

Incorporations may be formed for acquiring, holding and disposing of church or religious society property, for the benefit of religion, for works of charity and for public worship, in the manner hereinafter provided in this sub-division.

1899, 5th Ses. p. 236, Sec. 1; 1895, 3d Ses. p. 24, Sec. 1.

**CORPORATIONS SOLE:** Grant of corporate powers to one person with power to associate others with him, or to have succession without doing so empowers him, or his successor, to ex-

ercise all corporate powers; and his acts, when acting upon the subject matter of the corporation and within its sphere of action and grant of power, are acts of the corporation.—Penobscot B. Corp. v. Lamson, 16 Me. 224.

**Section 2283. Who May Make and Subscribe Articles of Incorporation:**

Any person being a bishop, overseer, presiding elder or clergyman of any church or religious society who shall have been duly chosen, elected or appointed, in conformity with the constitution, canons, rites, regulations or discipline of said church or religious society, and in whom shall be vested the legal title to the property of such church or religious society, may make and subscribe written articles of incorporation in duplicate and acknowledge the same before some officer authorized to take acknowledgments and file one of such articles in the office of the secretary of state and retain possession of the other.

1899, 5th Ses. p. 236, Sec. 2; 1895, 3d Ses. p. 24, Sec. 2.

**Section 2284. What Articles Shall Specify:** The articles of incorporation shall specify:

First. The name assumed by the corporation and by which it shall be known;

Second. The object of said corporation;

Third. The estimated value of the property at the time of making the articles of incorporation;

Fourth. The title of the person making such articles.

1899, 5th Ses. p. 236, Sec. 3; 1895, 3d Ses. p. 24, Sec. 3.

**Section 2285. Person Filing Articles Shall Become a Corporation Sole:**

Upon making and filing for record articles of incorporation as herein provided, the person subscribing the same, and his successor in office, by the name or title specified in the articles, shall hereafter be deemed, and is hereby created, a body politic and corporation sole, with continual perpetual succession, and shall have power to acquire and possess by donation, gift or purchase, and to retain and enjoy property, real, personal and mixed, and likewise to sell, grant, convey or rent or otherwise dispose of it at pleasure.

1899, 5th Ses. p. 236, Sec. 4; 1895, 3d Ses. p. 24, Sec. 4.

**Section 2286. Articles of Incorporation Evidence of Existence:** The articles of incorporation, or a certified copy of the one filed and recorded in the office of the secretary of state, shall be evidence of the existence of such corporation.

1899, 5th Ses. p. 236, Sec. 7; 1895, 3d Ses. p. 25, Sec. 7.



**Section 2287. Powers of Corporation:** Such corporation shall have the power to contract and to be contracted with, to sue and be sued, plead and be pleaded in all courts of justice, and to have and use a common seal by which all deeds and acts of such corporation shall pass and be authenticated.

1899, 5th Ses. p. 236, Sec. 5; 1895, 3d Ses. p. 25, Sec. 5.

**Section 2288. Instruments, How Signed and Executed:** All deeds and other instruments of writing shall be signed by the person, representing the corporation, in the official capacity designated in the articles of incorporation, and sealed with the seal of the corporation, an impression of which seal shall be filed in the office of the secretary of state.

1899, 5th Ses. p. 236, Sec. 6; 1895, 3d Ses. p. 25, Sec. 6.

## CHAPTER LXXXVIII.

### AGRICULTURAL FAIR CORPORATIONS.

#### Section.

2289. Limitation on quantity of land may hold.

2290. Limitation on amount of indebtedness.

#### Section.

2291. Must not be conducted for profit.

2292. County commissioners may aid corporation.

**Section 2289. Limitation on Quantity of Land May Hold:** Agricultural fair corporations may purchase, hold, or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon, and may sell, lease, or otherwise dispose of the same, at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactories, stock raising and general domestic industry.

1887 R. S. Sec. 2775.

**NOT A STATE AGENCY:** Annual contributions by the state to a state agricultural society which is required to report to the state, are not sufficient to make it a public corporation for the sole purpose of discharging a govern-

mental function on account of which it will be exempt from liability to persons injured by its negligence.—*Lane v. Minnesota State Agricultural Society*, 62 Minn. 175, 29 L. R. A. 708, 62 N. W. 382.

**Section 2290. Limitation on Amount of Indebtedness:** Such corporation must not contract any debts or liabilities in excess of the amount of money in the treasury at the time of contract, except for the purchase of real property, for which they may create a debt not exceeding five thousand dollars, secured by mortgage on the property of the corporation. The directors who vote therefor are personally liable for any debt contracted or incurred in violation of this section.

1887 R. S. Sec. 2776.

**Section 2291. Must not be Conducted for Profit:** Agricultural fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with

the term of membership and the mode of acquiring the same, must be provided for in their by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for the real estate and the improvements thereon, and to defray the current expenses of fairs.

1887 R. S. Sec. 2777.

**Section 2292. County Commissioners May Aid Corporation:** The board of county commissioners of any county in this state, in which there is a regularly organized agricultural fair association, or any other corporation or company having for its object the exhibition of live stock and agricultural products of their county, or of the state, may, in their discretion, appropriate annually out of the county treasury, any sum not to exceed five hundred dollars, to be paid to the trustees or managers of such association, to assist in defraying the expenses of such fair. But no appropriation can be made in any year in which a fair is not held, nor can any appropriation be made to more than one such association in any one year. Appropriations made under this chapter shall be paid out of the county general fund.

1887 R. S. Sec. 2778.

See note under Sec. 2289.

## CHAPTER LXXXIX.

### GAS CORPORATIONS.

#### Section.

2293. Must obtain privilege from city or town.

2294. Must supply gas on written application.

#### Section.

2295. Not required to lay service pipes when.

2296. Agent may enter premises to inspect meter.

2297. May shut off supply when.

**Section 2293. Must Obtain Privilege from City or Town:** No corporation hereafter formed must supply any city or town with gas, or lay down mains or pipes for that purpose in the streets or alleys thereof, without permission from the city or town authorities.

1887 R. S. Sec. 2787.

**FRANCHISE:** The right to use the streets and other public thoroughfares of the city for the purpose of placing therein or thereon pipes, mains, wires and poles for the distribution of gas, water or electric lights in which any one may engage or has a franchise belonging to the government, the privilege of exercising it can only be granted the state or the municipal government of the city acting under legislative authority.—Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co. 33 Fed. 659; Newport v. Newport Light Co. 84 Ky. 166.

**THE RIGHT AN EASEMENT:** The right granted by charter to a gas company to lay pipes in the streets of a city is an easement, and not a mere license.—Providence Gas Co. v. Thurber, 2 R. I. 15.

**MUNICIPAL REGULATIONS:** Regulations and ordinances prohibiting a gas company from laying its mains in the public streets in the winter months was held reasonable and not in restraint of trade as being passed for the purpose of preventing obstruction in the streets a nuisance.—Northern Liberties Commissioners v. Northern Liberties Gas Co. 12 Pa. 318.

**Section 2294. Must Supply Gas on Written Application:** Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet



from any main of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars a day as liquidated damages, for every day such refusal or neglect continues thereafter.

1887 R. S. Sec. 2788.

**COMPULSORY SERVICE:** The compulsion or duty to supply gas to a consumer on the part of the natural gas company which had a franchise to lay pipes in the streets and to supply the public is a tort, even if it is also a breach of contract.—*Coy v. Indianapolis Gas Co.* 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17. A gas company must furnish gas to any applicant on reasonable terms, and this is true, even though the franchise is not an exclusive one.—*Williams v. Mutual Gas Co.* 52

*Mich.* 499, 18 N. W. 236. And the fact that a person is already supplied with gas by another company does not excuse a gas company from furnishing him with gas on his application and compliance with reasonable regulations.—*Portland Natural Gas and O. Co. v. State*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818. Moreover, a gas company may be compelled by a mandamus to furnish gas as required by its charter to a person demanding it.—*People v. Manhattan G. L. Co.* 45 Barb. 136.

**Section 2295. Not Required to Lay Service Pipes, When:** No corporation is required to lay service pipe where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance, with the corporation a sum of money sufficient to pay the cost of laying such service pipe, or his proportion thereof.

1887 R. S. Sec. 2789.

**Section 2296. Agent May Enter Premises to Inspect Meter:** Any agent of a gas corporation exhibiting written authority, signed by the president or secretary thereof for such purpose, may enter any building or premises lighted with gas supplied by such corporation, to inspect the gas meters therein, to ascertain the quantity of gas supplied or consumed. Every owner or occupant of such buildings who hinders or prevents such entry or inspection must pay to the corporation the sum of fifty dollars as liquidated damages.

1887 R. S. Sec. 2790.

**Section 2297. May Shut off Supply, When:** All gas corporations may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied, or the rent for any meter, pipes, or fittings provided by the corporation as required by his contract; and for the purpose of shutting off the gas in such case any employee of the corporation may enter the building or premises of such person, between the hours of eight o'clock in the forenoon and six in the afternoon of any day and remove therefrom any property of the corporation used in supplying gas.

1887 R. S. Sec. 2791.

**CUTTING OFF SUPPLY:** A consumer may have an injunction to prevent the cutting off the supply of gas on the claim of arrears when there is

a controversy as to the indebtedness and at least something of an overcharge.—*Sickles v. Manhattan G. L. Co.* 66 Howard Pr. 314. Furnishing gas on an application therefor without ob-

jection on account of former indebtedness for gas, will not waive the right to shut off the gas for such prior indebtedness.—*People v. Manhattan G. L. Co.* 45 Barb. 136. Non-payment of a bill for gas at one house will not justify the cutting off the supply of an-

other house where the contracts for the houses are separate to authorize the stopping of the supply on default of payment for "gas consumed on said premises."—*Gas Co. of Baltimore v. Colliday*, 25 Md. 1.

## CHAPTER XC.

### LAND AND BUILDING CORPORATIONS.

#### Section.

2298. Defined. How organized. Amount of shares.  
 2299. May borrow money.  
 2300. May purchase real estate and make loans.  
 2301. May insure lives of members and debtors.  
 2302. Limitation on real estate holdings.

#### Section.

2303. What by-laws must specify.  
 2304. Secretary must make and publish annual statement.  
 2305. Liability of shareholders for debts.  
 2306. Consolidation and transfer.  
 2307. Married women and minors may hold stock.

**Section 2298. Defined. How Organized, Amount of Shares:** Corporations organized for the erection of buildings and making other improvements on real property, may raise funds in shares not exceeding two hundred dollars each, payable in periodical installments. Such bodies are known as land and building corporations, and may be organized with or without a capital stock.

1887 R. S. Sec. 2796.

**Section 2299. May Borrow Money:** Any such corporation may borrow money for the purpose of carrying out its objects, and may give as security therefor its shares or mortgages upon its real estate.

1887 R. S. Sec. 2797.

**PURPOSES:** A building and loan association, the plan of which contemplates the maturing of its stock by profits and accumulations, and the maturing of its stock by profits and accumulations, and the stock of which is issued in separate series at different dates, has power, in the absence of a by-law or statute to the contrary, to borrow money to pay off non-borrowing holders of the particular series of stock when it attains its par value.—*North Hudson Mutual Bldg. and Loan Ass'n v. Howard National Bank*, 79 Wis. 31, 11 L. R. A. 845, 47 N. W. 300. A building and loan association which has power to borrow money in the absence of any law expressly forbidding it may secure the payment of a loan by the assignments of bonds and mortgages which it holds against its members.—*Id.*

**RIGHT OF BORROWING MEMBER:** A borrowing member of a building and loan association has no right to receive interest on his stock payments or to have such payments applied in reduction of his indebtedness, unless such right is expressly reserved.

—*Reeve v. Ladies' Bldg. Ass'n*, 56 Ark. 335, 19 S. W. 917. A borrowing member of a building association is not entitled to cancellation of a mortgage given to secure the loan, until the dues paid and the dividends declared and not paid, equal the par value of his shares.—*Eversmann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184, 41 N. E. 139. A building and loan association loaned money to one of its stockholders, and the contract provided for monthly payments, to be applied in "premium for precedence" and on interest. Held, in determining whether the contract is usurious or not, the so-called "premium for precedence" must be regarded as interest, and that building and loan associations are subject to the penalties provided in cases of usurious contracts.—*Stevens et al. v. Home Saving & Loan Ass'n of Minneapolis, Minn.* (Idaho), 51 Pac. 779. (For opinion on rehearing see 51 Pac. 986.)

Where the borrower subscribes for shares in a loan association merely to obtain a loan, and is required to make monthly payments upon such shares, and by the terms of the contract the "maturity of the shares" extinguishes



the debt and cancels the stock, the borrower is a stockholder in fiction, and not in fact, and the actual relation between the parties is only that of creditor and debtor.—*Fidelity Sav. Ass'n v. Shea et al.* (Idaho), 55 Pac. 1022.

A contract between a borrower and a building and loan association provided that certain payments "shall

be credited as dues on \* \* \* stock (to) be continued until the dues so credited, \* \* \* together with the dividends, \* \* \* shall be equal to the amount loaned." Held, that the dues were payments on the loan.—*Stevens et al. v. Home Savings & Loan Ass'n* (Idaho), 51 Pac. 986. (On rehearing.)

**Section 2300. May Purchase Real Estate and Make Loans:** Any such corporation may purchase real estate and erect buildings for its members, and make loans to its members for the purpose of aiding them in acquiring and improving real estate. Such loan must in all cases be secured on such real estate.

1887 R. S. Sec. 2798.

**FORFEITURES:** Forfeited payments made by a member of a loan association on shares which lapse in consequence of his default can not be credited upon his loan from the association.—*Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599, 33 L. R. A. 112, 36 S. W. 386. And such forfeiture, if it is authorized by the contract of the parties, the rules and regulations and by-laws of the association, and the statute under which it is created, can not be

relieved against; and the mortgage given by such member may be foreclosed for the full amount of his original loan, with interest, without any abatement for the value of the stock or for payments made by him thereon.—*Southern B. & L. Ass'n v. Anniston L. & T. Co.* 101 Ala. 582, 29 L. R. A. 120, 15 So. 123. But see *Trustee S. & L. Assn. v. Cairns* (Wash.), 47 Pac. 509; *Randall v. National B. L. & P. Union*, 42 Neb. 809, 60 N. W. 1019, *contra*. See further, notes under Sec. 2303.

**Section 2301. May Insure Lives of Members and Debtors:** Such corporation may insure, in some life insurance company, the lives of its members and debtors. In case of the death of a debtor or members so insured, the amount recovered on the policy, must be applied to extinguish the indebtedness, including the premium paid, and the residue, if any, must be paid to the legal representative of the decedent.

1887 R. S. Sec. 2799.

**Section 2302. Limitation on Real Estate Holdings:** Any such corporation may purchase, hold, and convey real estate, as follows:

First. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed twenty thousand dollars;

Second. Such as may, from time to time, be necessary to supply the wants of members, the cost of which held unallotted to the members thereof at any one time, must not exceed the sum of fifty thousand dollars;

Third. Such as have been mortgaged, pledged, or conveyed to it in trust, to secure money loaned or to secure the purchase price thereof in pursuance of the regular business of the corporation.

1887 R. S. Sec. 2800.

**Section 2303. What By-Laws Must Specify:** The by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member; the time and manner in which such payments are to be made; the fines and for-

feitures for default; the time and manner of election of directors and other officers, and their terms of office; the manner in which the real estate may be distributed, allotted or sold to its members; the terms and conditions upon which loans may be made to its members, and by them repaid to the corporation; the manner in which a person may become, and cease to be a member, the conditions on which members may withdraw from the corporation, and the provisions for the payment to withdrawing members of the sums of money due them, arising from subscriptions or payments, and the proportion of the profits such withdrawing members may receive on withdrawal.

1887 R. S. Sec. 2801.

**FINES AND FORFEITURES:** A reasonable fine is in the nature of liquidated damages agreed to be paid for the non-performance of a promise.—*McGannon v. Central Bldg. Ass'n* No. 2, 19 W. Va. 726. Such fines may be enforced provided they are not so grossly in excess of the real loss by the default as to be penalties and not a fair measure of damages.—*Ocmulgee Bldg. & Loan Ass'n v. Thomson*, 52 Ga. 427. Fines for defaults of payments do not constitute a part of the interest which can be added thereto so as to make a violation of the usury laws.—*Clarksville Bldg. & Loan Ass'n v. Stephens*, 26 N. J. Eq. 351. Though the law is contrary in North Carolina.—*Rowland v. O. D. B. & L. Ass'n*, 116 N. C. 878, 22 S. E. 8. A charge for fines because the rules of the society did not provide for it was disallowed.—*Wilson v. Upper Canada Building Ass'n*, 12 Grant Ch. (U. C.), 206. The fact that a married woman was incapable of becoming a member of a building and loan association was held to relieve her from liability for the payment of fines or of any thing more than the amount of money actually loaned to her, with legal interest.—*Wolbach v. Lehigh Bldg. Ass'n*, 84 Pa. 211. But as a married woman has power to unite with her husband in making valid mortgage of her separate property to secure his debt to the association, the mortgage may secure the payment of premiums and fines due from him.—*Junaita Bldg. & Loan Ass'n v. Mixell*, 84 Pa. 313. But fines of ten cents for each loan of two hundred dollars in case of failure to pay monthly interest for each monthly neglect, provided for by the constitution of an association, held valid.—*Clarksville Bldg. & Loan Ass'n v. Stephens*, supra. But such a fine is held to be beyond the power of the association in West Virginia because it is only as a member of the corporation and in relation to its conduct as such that the power to impose a fine upon the person exists, and the rela-

tion created by the loan is a distinct relation of a borrower.—*McGannon v. Central Bldg. Ass'n*, No. 2, supra; *Forest City United Land & Bldg. Ass'n v. Gallagher*, 25 Ohio St. 208. Security for the payment of fines may be included in the mortgage.—*Hagerman v. Ohio Bldg. & Savings Ass'n*, 25 Ohio St. 186. But whatever remedy an association may have for the recovery of fines by forfeiture of the stock or otherwise, through its constitution and by-laws, they cannot be recovered in a suit upon the mortgage which does not embrace them.—*Hazel Loan & Bldg. Ass'n v. Groesbeck*, 17 Phila. 242.

**WITHDRAWAL OF MEMBERS:** Where a by-law provided that "all non-paying stockholders wishing to withdraw shall be privileged to do so upon giving notice to the directors of his or her intention, and shall be entitled to receive the amount of installments actually paid in without interest," it was held that the plaintiff's right of withdrawal was a vested right of which the defendant could not deprive him without his consent, by a subsequent repeal of the by-law.—*Holyoke Building and Loan Ass'n v. Lewis* (Colo.), 27 Pac. 872.

The right of members of a building and loan association under the by-laws upon one minute's notice to withdraw from the contributions they have made to its fund, is not applicable to the funds loaned by the association when the funds in the hands of the association can thus be withdrawn.—*State v. Redwood Falls Bldg. and Loan Ass'n*, 45 Minn. 154, 47 N. W. 540. A by-law that withdrawing members shall be paid in the order of the presentation of their application, is a reasonable regulation of a building and loan association, and is binding upon existing members.—*Englehardt v. F. W. P. D. L. & S. Ass'n*, 148 N. Y. 281, 42 N. E. 710. A stockholder does not become a general creditor of a building and loan association by giving notice of withdrawal.—*Heinbokel v. National Sav. L. & B. Ass'n*, 58 Minn. 340, 59 N. W. 1050, so, a notice of withdrawal from an insolvent



loan association does not entitle members to priority of payment over their fellow stockholders.—*Gibson v. Safety Homestead & L. Ass'n*. 170 Ill. 44, 39 L. R. A. 202, 48 N. E. 580. Likewise, notice of withdrawal before the appointment of a receiver of a building and saving association does not give priority to a shareholder of an insolvent association under by-laws providing for the pay-

ment of withdrawals "according to the priority of notice," but also providing that no more than 30 per cent. of the cash receipts of the loan fund during that month, shall be paid in any month, as these by-laws contemplate a going concern.—*Rabbitt v. Wilcoxon*, 103 Iowa, 35, 38 L. R. A. 183, 72 N. W. 306.

**Section 2304. Secretary Must Make and Publish Annual Statement:** The secretary of any such corporation must, once in each year during the existence of the corporation, prepare a full and explicit statement of the financial affairs thereof, comprising a balance sheet, statements of receipts and expenditures, profit and loss, and assets and liabilities, which must be audited and verified by two competent persons (not directors) elected by the general body of shareholders, and be countersigned by the president and secretary. A copy of such statement must be printed and circulated among the members, and appear immediately after the annual meeting of the corporation, daily at least one week, or weekly at least four weeks, in one or more newspapers published at the place of business of the corporation.

1887 R. S. Sec. 2802.

**Section 2305. Liability of Shareholders for Debts:** Every present and past member of such corporation is personally liable for such proportion of all its debts and liabilities, incurred during his membership, as the number of shares subscribed by him bears to the whole number of subscribed shares; but no past member is liable for such contribution if more than one year elapsed since he ceased to be a member before suit is commenced, nor for any debt or liability contracted after the time at which he ceased to be a member, nor unless it appears to the court that the corporation is unable to satisfy such debts and liabilities; nor must any contribution be required from any member or past member exceeding the amount unpaid on the shares in respect to which it is liable.

1887 R. S. Sec. 2803.

**Section 2306. Consolidation and Transfer:** Any two or more such corporations may unite and become incorporated in one body, with or without any dissolution or divison of the funds of such corporation, or either of them; or any such corporation may transfer its engagements, funds and property to any other such corporation upon such terms as may be agreed upon by two-thirds of the members of each of such bodies present at general meetings of the members, convened for the purpose, by notice, stating the object of the meeting, sent through the postoffice to every member, and by general notice appearing daily, at least one week, or weekly at least two weeks, in some newspaper published at the place of the principal business of the corporation; but no such transfer can prejudice any right of any creditor of either corporation.

1887 R. S. Sec. 2804.

**Section 2307. Married Women and Minors May Hold Stock:** Married women and minors may be admitted as members, and may take and hold shares in such corporations, and may execute all necessary instruments, and give all necessary acquittances, and sell and transfer their shares in like manner as other members.

1887 R. S. Sec. 2805.

## CHAPTER XCI.

### SURETY COMPANIES.

#### Section.

#### OF PERSONS IN PRIVATE POSITIONS.

- 2308. Must file articles of incorporation with secretary of state.
- 2309. What must file in addition to articles.
- 2310. Capital must be at least one hundred thousand dollars.
- 2311. Must deposit security for what amount.
- 2312. Deposit is liable for judgments.
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- OF PERSONS IN OFFICIAL POSITIONS AND OTHER BONDS.**
- 2323. Official bonds may be executed by a surety company.
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#### OF PERSONS IN PRIVATE POSITIONS.

**Section 2308. Must File Articles of Incorporation With Secretary of State:** Hereafter any corporation organized or controlled under the laws of this State, or of any state, or territory within the United States of America, or of any municipality of such state or territory, or of any foreign government, sovereignty or municipality for the purpose of issuing surety, guaranty or indemnity of bonds, guaranteeing the fidelity of persons in private office, employments or positions of trust and contracts, or for acting as surety on any such bonds, shall file with the secretary of state a certified copy of its articles of incorporation, and all amendments thereto.

1899, 5th Ses. p. 187, Sec. 1; 1893, 2d Ses. p. 86, Sec. 1.

**Section 2309. What Must File in Addition to Articles:** Such corporation shall file with the certified copy of its articles of incorporation and amendments thereto, a copy of its by-laws, together with the names and places of residence of its officers and directors, and a statement of its assets and liabilities showing its



net capital stock, and of what it consists, certified to by the president and secretary thereof.

1899, 5th Ses. p. 187, Sec. 2; 1893, 2d Ses. p. 86, Sec. 2.

**Section 2310. Capital Must be at Least One Hundred Thousand Dollars:** No such corporation shall transact any business in this State, unless it is possessed of at least one hundred thousand dollars, actual capital stock, and if the capital stock of such corporation consists either in whole, or in part, of bonds, mortgages, securities, or other property than money, the secretary of state shall require satisfactory evidence that the market value thereof is at least one hundred thousand dollars.

1899, 5th Ses. p. 188, Sec. 3; 1893, 2d Ses. p. 87, Sec. 3.

**Section 2311. Must Deposit Security for What Amount:** Such corporations before certificate of authority, hereafter provided for, is issued, shall deposit with the treasurer of this State money, bonds or other securities to be approved by the secretary of state to the amount of twenty-five thousand dollars.

1899, 5th Ses. p. 188, Sec. 4; 1893, 2d Ses. p. 87, Sec. 4.

**Section 2312. Deposit is Liable for Judgments:** The deposit required by the preceding section shall be held liable to pay any judgment that may be rendered against such corporation, and may be so decreed by the court rendering judgment against it; nor shall such company be permitted to withdraw from the state treasurer, its deposit or bonds for a period of one year after discontinuing business within this State, or while any suit is pending, or any judgment against it in this State remains unsatisfied.

1899, 5th Ses. p. 188, Sec. 5; 1893, 2d Ses. p. 87, Sec. 5.

**Section 2313. Must Designate Agent on Whom Service May be Had:** Such corporation shall file with the certified copy of its articles of incorporation a power of attorney, under its corporate seal, authorizing the treasurer of this State, or some designated agent, to accept service of any civil process for and on behalf of such corporation, and consenting that the service of any civil process upon the treasurer of this State, or designated agent as the case may be in any suit or proceedings in which the corporation is a party shall be taken and held to be valid. Said power of attorney shall be embodied in a resolution duly adopted by such corporation, and shall be signed by the president and secretary thereof, officially. If any agent other than the treasurer of this State be designated by said power of attorney he shall be a citizen of this State, and his full name and place of residence shall be stated in the power of attorney.

1899, 5th Ses. p. 188, Sec. 6; 1893, 2d Ses. p. 87, Sec. 6.

**Section 2314. Secretary May Issue Certificate to Corporation:** When any such corporation has complied with the provisions of this Chapter, the secretary of this State shall issue his certificate of authority authorizing said corporation to transact business in this State.

1899, 5th Ses. p. 188, Sec. 7; 1893, 2d Ses. p. 88, Sec. 7.

**Section 2315. Who Held to be Agent of Corporation:**

Any person who solicits business for or in behalf of such corporation, or makes or transmits for any person other than himself, any application for a guaranty, or security, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive, or deliver, a contract of guaranty, or security, or who shall examine, or investigate the character of any applicant for a guaranty, or security, for any person or persons other than himself, or who shall refer any applicant for a guaranty or security to such corporation, whether any of said acts shall be done at the instance or request, or by the employment of such corporation or other corporation or person or any person who shall issue indemnifying bonds or contracts, whose solvency and compliance with his said bonds or obligations is guaranteed directly or indirectly by any corporations, shall be held to be the agents of the corporation, so far as relates to all the liabilities and penalties prescribed by this Chapter.

1899, 5th Ses. p. 188, Sec. 8; 1893, 2d Ses. p. 88, Sec. 8.

Penalty for violating provisions of this section: Penal Code, Sec. 5024.

**Section 2416. Liability of Persons Doing Business with Unauthorized Corporation:**

Any persons or association of persons, or corporations, who shall accept any corporation created for the purpose or either of them mentioned in Section 2308 without such corporation having previously complied with the provisions and requirements of this Chapter, and having received from the secretary of this State the certificate of authority provided for in Section 2314, shall forfeit as a penalty the sum of one thousand dollars, to be recovered by suit in the name of the State in any court of competent jurisdiction.

1899, 5th Ses. p. 189, Sec. 10; 1893, 2d Ses. p. 88, Sec. 10.

**Section 2317. Corporation Refusing to Guarantee Must Furnish Statement:**

When any such corporation shall cancel or refuse to grant a bond of guaranty or indemnity, or shall notify the employer of the person whose fidelity is guaranteed, or to be guaranteed, that said corporation will no longer guarantee or be security or become guaranty of security for the fidelity of said person, or when said corporation has once guaranteed the fidelity of any person, or acted as security therefor and on application refuses to do so again, it shall furnish such person a full statement in writing, of the facts upon which the action of the corporation is based, and if such action be based in whole or in part on information, all such information together with the name or names of the informants with their places of residence, and such corporation failing or refusing to furnish such written statement within thirty days after a request therefor, shall be liable to the person injured in the sum of one thousand dollars, in addition to all other damages caused thereby, which may be sued for and recovered in any court of competent jurisdiction.

1899, 5th Ses. p. 189, Sec. 11; 1893, 2d Ses. p. 89, Sec. 11.

**Section 2318. Refusal to Comply With Preceding Section:**

If any such corporation shall fail or refuse to comply with



the provisions of Section 2317, the secretary of this State shall revoke the certificate of authority issued to such corporation.

1899, 5th Ses. p. 189, Sec. 12; 1893, 2d Ses. p. 89, Sec. 12.

**Section 2319. Corporations are Charged With a Public Use:** Corporations controlled for the purpose mentioned in Section 2308 are hereby declared to be charged with a public use.

1899, 5th Ses. p. 189, Sec. 13; 1893, 2d Ses. p. 89, Sec. 13.

**Section 2320. Employee Cannot be Charged With Cost of Guaranty:** It shall be unlawful for any railroad or other corporation doing business within this State, to collect or retain from the wages of the persons in their employ, the cost of such guaranty or security, and such employees shall be permitted to select such guaranty or surety company or companies or individuals, complying with the provisions of this Chapter, and such employees shall be permitted to pay the premium of their bonds, freely and voluntarily.

1899, 5th Ses. p. 189, Sec. 14; 1893, 2d Ses. p. 89, Sec. 14.

**Section 2321. Must Furnish Applicant With Copy of Bond:** Any corporation, company or individual complying with the provisions of this Chapter, issuing such bonds of indemnity, guaranty, or security, shall furnish the applicant with a true and complete copy of the original bond, furnished the corporation, company or individual to whom the bond was issued.

1899, 5th Ses. p. 189, Sec. 15; 1893, 2d Ses. p. 89, Sec. 15.

**Section 2322. Chapter Does not Apply to Person, When:** Nothing contained in this Chapter shall be construed to apply to any citizen or persons of this State offering or becoming surety, upon bonds or otherwise, for any other citizen or person without compensation to him.

1899, 5th Ses. p. 190, Sec. 16; 1893, 2d Ses. p. 90, Sec. 16.

#### OF PERSONS IN OFFICIAL POSITIONS AND OTHER BONDS.

**Section 2323. Official Bonds May be Executed by a Surety Company:** Whenever any bond, undertaking, recognizance or other obligation is by law or the charter, ordinances, rules or regulations of any municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filed with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety company qualified as hereinafter provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of every law, charter, ordinance, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such sureties shall be residents or householders, or free holders, or either or

both, or posssss any other qualification, and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character shall accept and treat such bond, undertaking, obligation, recognizance, or guaranty, when so executed by such company, as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation.

1899, 5th Ses. p. 337, Sec. 1.

**Section 2324. Qualification Requisite to do Business in This State:** Such company must be authorized under the laws of the State where incorporated, and under its charter, to become surety upon such bond, undertaking, obligation, recognizance or guaranty; must have a fully paid up and safely invested and unimpaired capital of at least \$250,000; must have good available assets exceeding its liabilities, which liabilities for the purposes of this Subdivision shall be taken to be its capital stock its outstanding debt and premium reserve at the rate of fifty per centum of the current annual premium on such outstanding bond, undertaking, recognizance and obligation of like character in force; must file with the secretary of state a certified copy of incorporation, a written application to be authorized to do business under this Subdivision, and also with such application and in April of each year thereafter, a statement verified under oath, made up to December 31st, preceding, stating the amount of its paid up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, undertakings, recognizances and obligations of like character in force upon which it is surety, the amount of liability for unearned portion thereof estimated at the rate of fifty per centum of the current annual premiums on each such bond, undertaking, recognizance and obligation in force, stating also the amount of its outstanding obligations of all kinds and if such company be organized under the laws of any other state, it must have on deposit with a state officer of one of the states of the United States, not less than \$100,000 in good securities, deposited with and held by such officer for the benefit of the holders of its obligations; must also appoint an attorney in this State upon whom process of law can be served, which appointment shall continue until revoked or another attorney substituted and must file with the secretary of state evidence of such appointment, which shall state the residence and office of such attorney.

1899, 5th Ses. p. 338, Sec. 2.

**Section 2325. Secretary of State Shall Issue Certificate, When:** The secretary of state upon due proof by any such company of its possessing the qualifications in this Subdivision specified, shall issue to such company a certificate setting forth that such company has qualified and is authorized for the ensuing year to do business under this Subdivision, which said certificate shall be evidence of such qualification of such company and of its authorization to become and to be accepted as sole surety on all bonds, undertakings, recognizances, and obligations, required or permitted by law or the



charter, ordinances, rules or regulations of any municipality, board, body, organization or public officer, and the solvency and credit of such company for all purposes and its sufficiency as such surety.

1899, 5th Ses. p. 338, Sec. 3.

**Section 2326. What Companies Entitled to Certificate:** Such surety companies only as have complied with the provisions of sections two, three, four and five of the act of Congress, approved August 13th, 1894, entitled: "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon" shall be permitted to do business in this State and that no certificate under the preceding section shall issue, until a compliance with the provisions of said sections of said act of Congress is shown. And said surety companies must also file with the annual statement prescribed by Section 2324 evidence that their authority to do business has not been revoked under the provisions of said act of Congress.

1899, 5th Ses. p. 339, Sec. 7.

**Section 2327. Annual License:** All surety companies doing business in this State shall pay to the State treasurer an annual license fee. Fifty dollars payable at the time of filing the first statement and annually thereafter, in April of each year, and before certificate of authority is issued. Certificates of such payments shall be made by the treasurer to the secretary of state and state auditor. Licenses so collected shall be paid into the general fund.

1899, 5th Ses. p. 340, Sec. 8.

**Section 2328. Premium for Bond, by Whom Paid:** The premium or charge for procuring bonds from surety companies for state, district, county, city, village or independent school district treasurers, shall be paid by the state, district, county, city, village or independent school district respectively, not to exceed, however, the sum of three and one-half dollars per annum for each thousand dollars of the bond: *Provided*, That premiums on bonds given by the county assessors and tax collectors to protect any city or independent school district, operating under a special charter or law, shall be paid by the county.

In case of all other state, district, county, city, village or independent school district officers one-half of the premium shall be paid by such state, district, county, city, village or independent school district.

1901, 6th Ses. p. 294.

**Section 2329. Not Necessary for Company to be Taxpayer:** It shall not be necessary for any surety company authorized under this sub-division to do business in this state to show that it is a taxpayer or property owner within this state.

1899, 5th Ses. p. 340, Sec. 10.

**Section 2330. Company Giving Bond Estopped to Deny Corporate Existence:** Any company giving any bond, or recognizance under this sub-division shall be estopped in any pro-

ceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute such instrument or assume such liability.

1899, 5th Ses. p. 340, Sec. 11.

**Section 2331. Right to do Business Forfeited, When:**

If any surety company doing business under this sub-division shall neglect or refuse to pay any final judgment rendered against it upon any bond or undertaking made or guaranteed by it under the provisions of this sub-division from which no appeal, writ of error or supersedeas has been taken for ninety days after the rendition of such judgment or decree, it shall forfeit all right to do business in this state.

1899, 5th Ses. p. 340, Sec. 12.

**CONTRIBUTION:** A surety company which indemnified one of the sureties upon an official bond and is compelled to pay a judgment against all of them on such bond, has no right

of contribution against his co-sureties, and cannot acquire any from the surety indemnified, as he holds the indemnity in trust for them as well as himself.—*Gibson v. Sheehan*, 5 App. D. C. 391, 28 L. R. A. 400.

## CHAPTER XCII.

### TRUST, GUARANTEE TITLE, ABSTRACT AND SAFETY DEPOSIT COMPANIES.

**Section.**

2332. Rights and powers.  
2333. Amount of paid up capital.  
2334. Capital to be in lieu of bond.  
2335. Executor, trustee, etc., may deposit funds with.

**Section.**

2336. Court may direct funds to be deposited with.  
2337. Court may examine into affairs of company, when.

**Section 2332. Rights and Powers:** Companies which may hereafter be incorporated under the provisions of this chapter, shall have the power and right:

1. To furnish abstracts of title to real estate; to guarantee the title, and to make insurances of every kind pertaining to or connected with titles to real estate and to make, execute, and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor.

2. To receive and hold on deposit and in trust and as security, estate, real and personal, including the notes, bonds, obligations of states, individuals, companies, and corporations, and the same to purchase, collect, adjust and settle, sell and dispose of in any manner, without proceedings in law or equity, and for such price, and on such terms as may be agreed on between them and the parties contracting with them.

3. To act as trustees, assignees, receivers, guardians, executors, administrators, and to take, accept, and execute trusts of every description not inconsistent with the laws of this state or of the United States, and to receive deposits of moneys and other personal property and issue their obligations therefor, to invest their funds in and to purchase real and personal securities, and to loan money on real and personal securities.



4. To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and distribute money, transfer, register, and countersign certificates of stocks, bonds, or other evidences of indebtedness, and to receive and manage any sinking fund thereof on such terms as may be agreed upon.

5. To take, receive and hold any and all such pieces of real property as may have been or may hereafter be, the subject of any insurance made by such companies under the powers conferred by their charter, and the same to grant, bargain, sell, convey, and dispose of in any such manner as they see proper.

6. To purchase and sell real estate and take charge of the same.

7. To become security for the payment of all damages that may be assessed and directed to be paid for lands taken in the building of any railway, or for the purposes of any railway, or for the opening of streets or roads, or for any purpose whatever where land or property is authorized by law to be taken.

8. To become security upon any writ of error or appeal, or in any proceeding instituted in any court in this state, in which security may be required.

1901, 6th Ses. p. 26, Sec. 1.

**Section 2333. Amount of Paid Up Capital:** Before exercising any of the powers hereby conferred, each such corporation shall have a paid up capital of not less than twenty-five thousand dollars, an affidavit of which fact, made by the treasurer thereof, shall be filed in the office of the secretary of state, and a copy of such affidavit certified under the seal of the office of the secretary of state shall be evidence of compliance with the requirements hereof.

1901, 6th Ses. p. 28, Sec. 2.

**Section 2334. Capital to be in Lieu of Bond:** Whenever such companies shall receive and accept the office or appointment of assignees, receivers, guardians, executors, administrators, or to be directed to execute any trust whatever, or engage in the compiling of abstracts, the capital of the said company shall be taken and considered as the security required by the law for the faithful performance of their duties as aforesaid and shall be absolutely liable in case of any default whatever.

1901, 6th Ses. p. 28, Sec. 3.

**Section 2335. Executor, Trustee, Etc., May Deposit Fund With:** Any executor, administrator, guardian or trustee, having the custody or control of any bonds, stocks, securities or other valuables belonging to others shall be authorized to deposit the same for safe keeping with said companies.

1901, 6th Ses. p. 28, Sec. 4.

**Section 2336. Court May Direct Funds to be Deposited With:** Every court into which moneys may be paid by parties, or be brought by order or judgment, may, by order, direct the same to be deposited with any such corporation.

1901, 6th Ses. p. 28, Sec. 5.

**Section 2337. Court May Examine into Affairs of Company, When:** Whenever any court shall appoint said companies, assignees, receivers, guardians, executors, administrators, or to execute any trust whatever, the said court may in its discretion, examine the officers of said company under oath or affirmation as to the manner in which its investments are made and the security afforded to those by or for whom its engagements are held.

1901, 6th Ses. p. 28, Sec. 6.

## CHAPTER XCIII.

### INSTITUTIONS OF LEARNING.

#### Section.

2338. Who may form corporation.

2339. What articles of incorporation must specify.

2340. Number of directors; residence of.

2341. By-laws to provide for election of directors.

2342. Secretary of state to issue certificates.

#### Section.

2343. Articles of incorporation may be amended.

2344. Power to acquire and sell real estate.

2345. Powers of directors.

2346. No religious test shall be required.

2347. Can not incorporate for private gain.

**Section 2338. Who May Form Corporation:** Any number of persons not less than five, may form a corporation to found, establish and maintain a college, academy, seminary or other institution of learning by executing and filing articles of incorporation in the manner provided by law for private corporations.

1899, 5th Ses. p. 169, Sec. 1; 1893, 2d Ses. p. 14, Sec. 1.

The provisions of the New York revised statutes as to the incorporation of colleges are not restricted to colleges incorporated by the regents of

the university of the state, but apply also, except as otherwise provided, to colleges created by special charters.—*In re McGraw Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233.

**Section 2339. What Articles of Incorporation must Specify:** The articles of incorporation shall set forth:

First. The name of the corporation;

Second. The purposes for which it is formed;

Third. The place where the institution is to be located;

Fourth. The number of its directors or trustees, and the names and addresses of those who are first appointed.

1899, 5th Ses. p. 169, Sec. 2; 1893, 2d Ses. p. 15, Sec. 2.

**Section 2340. Number of Directors; Residence of:** The number of directors or trustees shall not be less than five, nor more than eighteen, a majority of whom shall be residents of the State of Idaho.

1899, 5th Ses. p. 169, Sec. 3; 1893, 2d Ses. p. 15, Sec. 3.

**Section 2341. By-laws to Provide for Election of Directors:** Such corporation shall by its by-laws provide for the election of directors or trustees, in such manner, at such times and places, for such periods and from such persons as may be considered most conducive to its interests: *Provided*, A majority of such directors or trustees shall be bona fide residents of the State of Idaho.

1899, 5th Ses. p. 170, Sec. 7; 1893, 2d Ses. p. 15, Sec. 7.



**Section 2342. Secretary of State to Issue Certificate:**

When the articles of incorporation are filed as provided in section 2338, the secretary of state shall issue a certificate over the great seal of the state, stating that a copy of the articles of incorporation has been filed in his office containing the necessary statement of facts.

1899, 5th Ses. p. 169, Sec. 4; 1893, 2d Ses. p. 15, Sec. 4.

**Section 2343. Articles of Incorporation may be Amended:**

The articles of incorporation may be altered or amended in any particular except as to the purposes for which the corporation is formed, and such alteration or amendment shall have effect from and after the time of filing a certificate of the same, executed by at least two-thirds of the directors or trustees, in the same manner as the original articles are filed. When such alteration or amendment changes the name, the secretary of state shall issue a certificate stating the fact.

1899, 5th Ses. p. 169, Sec. 5; 1893, 2d Ses. p. 15, Sec. 5.

**Section 2344. Power to Acquire and Sell Real Estate:**

Such corporation shall have power of perpetual succession, and in addition to the powers granted by law to other private corporations, shall have power to take by purchase, gift, grant, devise or bequest and to hold the same for the use of such corporation, any real or personal property whatsoever, and to sell, convey, mortgage or otherwise use the same as may be considered most conducive to the interests of such institution; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the corporation, and such corporation shall have no power to divert any gift, grant, bequest or devise from the specific purpose designated by the donor.

1899, 5th Ses. p. 169, Sec. 6; 1893, 2d Ses. p. 15, Sec. 6.

**PURPOSES:** A college "incorporated to acquire and hold property in trust for the \* \* \* church, and to endow, build up and maintain an institution for educational purposes" authorized by statute to "purchase, receive, possess and dispose of such real and personal property as may be nec-

essary or convenient to carry out the object of said corporation" and adopted by the legislature as the agricultural college of the state, may take and hold land donated for collegiate purposes entirely independent of any benefit to the church, and the trustees can convey the same whenever the interests of the college demand it.—*Liggett v. Ladd* (Or.), 31 Pac. 81.

**Section 2345. Powers of Directors:**

The directors shall have the control of the affairs and property of the corporation, and may appoint and fix salaries of president, principal and professors, tutors, and other teachers, and such other officers and agents as they may deem necessary, and remove them at pleasure; and may prescribe the course of study and the discipline to be observed in the institution, or any department thereof, and may grant such literary honors and degrees as are usually granted by like institutions, and give suitable diplomas in testimony thereof.

1899, 5th Ses. p. 170, Sec. 8; 1893, 2d Ses. p. 16, Sec. 8.

**Section 2346. No Religious Test Shall be Required:**

No religious test whatever shall be required of any applicant for ad-

mission into any institution of learning existing under the provisions of this chapter

1899, 5th Ses. p. 170, Sec. 9; 1893, 2d Ses. p. 16, Sec. 9.

**Section 2347. Cannot Incorporate for Private Gain:** No corporation whose purpose is private gain shall ever be incorporated or continued in existence by virtue of the provisions of this chapter.

1899, 5th Ses. p. 170, Sec. 10; 1893, 2d Ses. p. 16, Sec. 10.

## TITLE XII.

### PROPERTY AND PROPERTY RIGHTS.

- Chap. XCIV. Definitions and General Provisions.
- Chap. XCV. Estates in Real Property.
- Chap. XCVI. Rights and Obligations of Owners.
- Chap. XCVII. Transfers in General.
- Chap. XCVIII. Transfer of Real Property.
- Chap. XCIX. Acknowledgments.
- Chap. C. Recording Transfers.
- Chap. CI. Unlawful Transfers.
- Chap. CII. Homesteads.
- Chap. CIII. Wills.
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- Chap. CVI. Water Rights and Irrigation.
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## CHAPTER XCIV.

### DEFINITIONS AND GENERAL PROVISIONS.

- |   |   |
|---|---|
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| 2358. Future interest when contingent.              |   |

**Section 2348. Real Property, What is:** Real property or real estate consists of:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer;
2. That which is affixed to land;
3. That which is appurtenant to land.



1887 R. S. Sec. 2825.

Sub. 1. Possessory rights to a ditch and water rights are real property. A non-user of a ditch brought about by circumstances over which the owner has no control is not evidence of abandonment, or intention to abandon such ditch.—*Welch v. Garrett* (Idaho), 51 Pac. 405; *Ada Co. Farmers' Irrigation Co. v. Farmers' Canal Co.* (Idaho), 51 Pac. 990. A ditch constructed for mining purposes on unoccupied public lands of the United States is held by grant and the owner of such ditch does not forfeit his right thereto by non-user.—*Welch v. Garrett*, *supra*. The owner of a ditch on public lands of the United States does not forfeit the same merely by non-user.—*Ada Co. Farmers' Irrigation Co. v. Farmers' Canal Co.* *supra*. One who constructs a ditch across the public lands of the United States in accordance with the statutes of the United States has a good title to said right of way against one who afterwards secures a patent to the land crossed by said ditch, from the government of the United States, and the said patent is subject to said right of way for said ditch and it is immaterial whether said right of way is reserved in said patent or not.—*Welch v. Garrett*, *supra*.

Ditches and water rights: Chap. CVI.

Mining claims, locations, etc.: Chap. CV.

Sub. 2. **FIXTURES:** A general rule of law is that whatever is once affixed to a freehold becomes a parcel thereof and passes with the conveyance of the estate, although the rule has been in modern times greatly relaxed as between landlord and tenant in relation to the things affixed for the purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use; it remains in full force as between vendor and vendee.—*Sands v. Pfliffer*, 10 Cal. 259; *Fratt v. Whittier*, 58 Cal. 126. The criterion of an immovable fixture is the united application of three requisites, (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent annexation to the freehold.—*Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33, 19 N. E. 753. The intention is the pre-eminent element in determining whether or not an article is a fixture as between landlord and tenant.—*Morey v. Hoyt*, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127; *Fratt v. Whittier*, *supra*; *Hendy v. Din-*

*kerhoff*, 57 Cal. 3. Also the use to which it is put and the nature and character of the act by which it is put in its place.—*Atchison T. and S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. 809. Also the nature and the object, effect and mode of its annexation. Where machinery put in a mill is heavy and not intended to be moved from place to place, but when put in position to be used with the building until worn out or for some unforeseen cause the real estate is put to a different use, it constitutes part of the realty.—*Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 6 L. R. A. 249, 23 N. E. 327. Where a party occupying a mining claim on public land constructed thereon an engine house and within it erected an engine placed on a frame bolted down to timbers which were sunk in the ground and earth tamped around them, and the machinery was necessary for the development of the mine, it is held to be a fixture.—*Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* (Colo.), 24 Pac. 920.

A frame building used as a tannery is a part of the realty to which it is attached, and that it was conveyed separate therefrom and by bill of sale does not make it repleviable.—*Eddy v. Hall*, 5 Colo. 576.

Machinery and appliances of a permanent character within and attached to a building with the intention of making soap and candles are fixtures and form a part of the realty.—*Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. 184, 13 Amer. State Rep. 147, note 153. Express agreement of the parties may fix upon chattels annexed to realty any character they may agree upon.—*Bank v. North*, 160 Pa. St. 811, 28 Atl. 694. For a general discussion of the subject of fixtures see *Hubbell v. Savings Bank*, 42 Am. Rep. 446, note 447 and *Johnson v. Wiseman*, 83 Am. Dec. 475, note 480.—*Standart v. Water Co.* 77 Cal. 399, 19 Pac. 689. What fixtures may be removable by a tenant, Sec. 2385. Mortgage a lien upon fixtures, Sec. 2805. Fixtures made the subject of larceny, Penal Code, Sec. 4965.

Sub. 3. Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing.—*Bouv. Law Dict.* 173. And includes generally any thing necessary to the enjoyment of the thing granted. It is the nature and use of the thing annexed which makes it appurtenant or not as the case may be.—4 Kent. 468. The right to use water for granted premises was held to pass as appurtenant.—*Farmer v. Water Co.* 56

Cal. 11. Also that appurtenances may be corporeal as well as incorporeal in nature.—Id. The right to have water flow into a ditch is appurtenant thereto.—Lower Kings River Water Co. v. Fresno Canal Co. 60 Cal. 408. Electric poles and wires are appurtenant to the premises of a company where the electricity is generated.—Lumber Co. v. Water Co. 48 Kan. 184, 30 Amer. State Rep. 303, 29 Pac. 476. A reservation in a deed relating to appurtenances must be construed strictly.—Scheel v. Alhambra Co. 79 Fed. 825. The right to the use of water for the irrigation of land together with the ditch making such rights available becomes so attached to the land as part and parcel thereof as to parties by a conveyance to the land without mentioning the water right.—Frank v. Hicks (Wyo.), 35 Pac. 475. Where a grantor possesses

the right to conduct water to the land granted over the land of another, such right passes to the grantee as an appurtenance. —Coventon v. Seufert (Ore.), 32 Pac. 508. The fact that a license to convey water over the premises of another is revocable does not prevent the water right from passing as appurtenant to the land upon which it is used.—Crooker v. Benton (Cal.), 28 Pac. 953. The fact that the owner of land acquired title through purchase of possessory rights merely does not prevent the water right thereto from passing as appurtenant to the land.—Geddis v. Parish (Wash.), 21 Pac. 314. For a discussion as to what passes as appurtenant to land, see Strickler v. Todd, 13 Am. Dec. 649, note 657.

Land cannot pass as appurtenant to land.—Armstrong v. Dubois, 90 N. Y. 95.

**Section 2349. Personal Property, what is:** Every kind of property that is not real is personal.

1887 R. S. Sec. 2826.

Growing crops which are the product of industry and care, sown by the owner of the soil, are while growing and immature, personal property.—Polley v. Johnson, 52 Kan. 478, 35 Pac. 8; Mabry v. Hark, 53 Kan. 398, 36 Pac. 743. Growing crops are not goods or chattels within the meaning of the statute of frauds from the very necessity of the case, as they are not susceptible to manual delivery.—Bours v. Webster, 6 Cal. 661; Davis v. McFarlane, 37 Cal.

634, 99 Am. Dec. 340. As between the mortgagee of lands who purchases at the foreclosure sale, and execution creditors of the mortgagor, in possession, the former is entitled to the growing crops.—Crews v. Pendleton, 19 Am. Dec. 750.

Shares of stock in a corporation are personal property: Sec. 2122.

Sales of personal property: Chap. CXI.

Mortgage of personal property: Sec. 2818 et seq.

**Section 2350. Interest in Common Defined:** Every interest created in favor of several persons in their own right, is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, or unless acquired as community property.

1887 R. S. Sec. 2828.

**Section 2351. Community Property Defined:** Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.

1887 R. S. Sec. 2829.

Community property: See Sec. 2053 and note.

**Section 2352. Mere Possibility is not Interest in Property:** The mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

1887 R. S. Sec. 2835.

**Section 2353. Future Interests Pass how:** Future interests pass by succession, will and transfer in the same manner as present interests.

1887 R. S. Sec. 2834.  
Wills: Chapter CIII.

Transfer: Chapters XCVII and XCVIII.

Succession: Chapter CIV.



**Section 2354. Who may own Property:** Any person, may take, hold, and dispose of property, real or personal, except as provided in the next section.

1887 R. S. Sec. 2827, exception added. property: Sec. 2355, and note.  
Restrictions on taking and holding

**Section 2355. Limitation on Alien Ownership:**

No person other than a citizen of the United States, or who has declared his intention to become such, nor any association or corporation, except railway corporations, whose members are not exclusively citizens of the United States, or persons who have declared their intention to become such, shall hereafter acquire any land, or title thereto, or interest therein, other than mineral lands, or such as may be necessary for the actual working of mines and the reduction of the products thereof: *Provided*, That no person not eligible to become a citizen of the United States shall acquire title to any land or real property within this state, except as hereinafter provided: *Provided, further*, This section, shall not prevent the holders (whether aliens or non-residents, corporations or associations) of liens upon real estate, or any interest therein, heretofore or hereafter acquired from holding or taking a valid title to the real estate in the enforcement of such lien; nor shall it prevent any such alien, association or corporation from enforcing any lien or judgment for any debt or liability now existing, or which may be hereafter created, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment, nor from preventing widows or heirs who are aliens, or who have not declared their intention to become citizens, from holding lands by inheritance; but all lands acquired as aforesaid shall be sold within five years after the title there to shall be perfected in such alien, association or corporation, and in default of such sale, within such time, such real estate shall revert and escheat to the State of Idaho. The provisions of this section shall not be construed in any way to prevent or interfere with the ownership of mining land, or land necessary for the working of mines or the reduction of the products thereof.

1899, 5th Ses. p. 70; 1891, 1st Ses. p. 108.

As to ownership of mines, see Sec. 2555, this Code.

**ALIENS:** This section changes the common law in regard to the disability of aliens to hold and dispose of land within this state. By the common law, aliens could take and hold land by grant or purchase, but could not acquire it by descent, or other operation of law.—*Norris v. Hoyt*, 18 Cal. 217; *Fairfax v. Hunter*, 7 Cranch. 603, 3 L. Ed. 453; *Carrasco v. State*, 67 Cal. 385, 7 Pac. 766; *Gouverneur v. Robertson*, 11 Wheat. 332, 6 L. Ed. 488.

Where an alien corporation has made a loan secured by a mortgage on land *Mort. Co. v. Carstens* (Wash.), 47 Pac. 421. Every corporation, the majority of the capital stock of which is owned

by aliens, shall be considered an alien for the purposes of this prohibition.—*Id.* The stock of a corporation owning land is personal property, and the fact that an alien owns stock in such corporation does not disturb the title of the corporation to the real estate.—*Princeton Min. Co. v. First National Bank* (Mont.), 19 Pac. 210.

The fact that an alien cannot initiate title to government land does not affect his right to make a valid appropriation of water, the test of such appropriation being priority of possession and beneficial use, without regard to the competency of the appropriator to pre-empt the place of intended use.—*Water Works v. Peralta*, 113 Cal. 38, 45 Pac. 168. The grant of a ditch and water right to an alien is not an abandonment by the owner.—*Quigley v.*

Birdseye (Mont.), 28 Pac. 741.

Prior to the act of congress of March 3, 1887, known as the "Alien Act," there was nothing in the laws of the United States nor of the territory of Idaho prohibiting aliens from holding and working mining ground under a lease from one qualified, and who made a proper location of such mining ground.—*Ah Kle v. McLean* (Idaho), 32 Pac. 200.

Where an alien acquires title to land in contravention of a statute which prohibits the ownership of lands by aliens, the taking of a direct deed from the mortgagor in satisfaction of the debt, without foreclosure, is not prohibited under the statute which prohibits the ownership of lands by aliens, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts.—*Oregon* aliens, unless within the exceptions named, said title can be attacked by the state only, and cannot be raised by an individual, or in a collateral proceeding.—*Oregon Mortgage Co. v. Carstens* (Wash.), 47 Pac. 421; *Goon Gan v. Richardson* (Wash.), 47 Pac. 762; *Princeton Min. Co. v. Bank*

(Mont.), 19 Pac. 210; *Gouverneur v. Robertson*, 11 Wheat. 332, 6 L. Ed. 483; *Water Works v. Peralta*, 113 Cal. 38, 45 Pac. 741; *Quigley v. Birdseye* (Mont.), 28 Pac. 741; *Cross v. Del Valle*, 1 Wall. 5, 17 L. Ed. 515; *Racouillat v. Sensevain*, 32 Cal. 376.

Where an alien purchases land, in the name of a trustee, for the purpose of evading the laws prohibiting an alien from holding land, upon an express trust to sell the premises, pay off encumbrances, and pay the residue to such alien, a purchaser from the trustee takes the land discharged of any claim, in favor of such alien or purchaser from him. And the surplus of the proceeds of such sale belongs to the state by escheat, after the encumbrances are paid off, and may be reached in the hands of the trustee by a bill in equity.—*Leggett v. Dubois*, 28 Am. Dec. 413, note 417.

The disability of aliens in respect to acquiring, holding and inheriting lands is now very generally removed by statutes of most of the states.—*Elmendorff v. Carmichael*, 14 Am. Dec. 86, note 97.

Alien's right to inherit property: Sec. 2552.

**Section 2356. Personal Property, by what Law Governed:** If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicile.

1887 R. S. Sec. 2890.

**Section 2357. Future Interest, when Vested:** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the immediate or precedent interest.

187 R. S. Sec. 2830.

**Section 2358. Future Interest, when Contingent:** A future interest is contingent while the person in whom, or the event upon which, it is limited to take effect remains uncertain.

1887 R. S. Sec. 2831.

**Section 2359. Future Interest may be Created to Take Effect how:** Two or more future interests may be created to take effect in the alternative; so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

1887 R. S. Sec. 2832.

**Section 2360. Posthumous Children to take in what Manner:** When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

1887 R. S. Sec. 2833.

Future interests defeated by the

birth of a posthumous child: Sec. 2361, and note.



**Section 2361. Future Interest when Defeated:** A future interest, depending on the contingency of the death of any person without successors, heirs, issue or children, is defeated by the birth of a posthumous child of such person capable of taking by succession.

1887 R. S. Sec. 2837.

A child in ventre sa mere, for the purpose of inheritance, or for every purpose which is for its benefit, is considered in esse at the time of its father's death.—*Marsellis v. Thalheimer*, 21 Am. Dec. 66; *Starling v. Price*, 16

Ohio St. 29; *Land's Appeal*, 85 Pa. St. 339; *Grace v. Rittenberg*, 14 Ga. 232; for a full discussion of this subject see *Harper v. Archer*, 43 Am. Dec. 472, and note, 474.

Posthumous children: Sec. 2360.

**Section 2362. Future Interests Cannot be Defeated when:** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise.

1887 R. S. Sec. 2838.

A contingent remainder, requiring by common law, a particular estate to support it, can never be held in abeyance. If the particular estate terminated, in whatever manner, before the remainder could vest, the remainder was gone forever. A freehold could not commence in futuro. It followed that if the particular estate terminated before the happening of the contingency, the remainder was destroyed; thus the

particular estate might be destroyed by fine, feoffment, or by a merger and the remainder fall with it. The policy of legislation generally, however, has been to place contingent remainders beyond the reach of accident to the precedent estate.—1 N. Y. R. S. 725, Sec. 3235. Thus the New York statute renders expectant estates no longer dependent on the continuance of a precedent estate.—See 4 Kent Comm. 253-256.

**Section 2363. Future Interest not Defeated by what:** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

1887 R. S. Sec. 2839.

**Section 2364. Power of Alienation, how Long Suspended:** The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation, or condition, except in the single case of contingent remainder fee authorized in section 2367.

1887 R. S. Sec. 2836.

This includes a trust of real property.—*Coster v. Lorillard*, 14 Wend. 265-313; *Kane v. Gott*, 24 Wend. 641; *Boynton v. Hoyt*, 1 Denio, 53-58; *Beekman v. Bonsor*, 23 N. Y. 298-316. The words "limitation or condition" are substituted for "estate" so as to include powers. See cases cited above.

This section does not apply to trusts for charitable purposes.—*Estate of Hinckley*, 58 Cal. 457. Municipal cor-

porations may take property in trust for charitable purposes.—Id. Charities are not prohibited by the provisions of the Code prohibiting perpetuities.—Id. In order that there be a good trust for a charitable use, there must be some public benefit open to an indefinite and vague number of people.—*People v. Cogswell*, 113 Cal. 129, 45 Pac. 270; *Russell v. Allen*, 107 U. S. 163, 27 L. Ed. 397.

Contingent remainder in fee: Sec. 2367.

**Section 2365. Person may Own Private Game Preserve:** Any person, association or corporation may establish, maintain or own a private park, lake or stream for fish or game, or both, on premises owned by him or it respectively; and to that end may employ means to preserve and propagate such fish and game.

1899, 5th Ses. p. 467.

## CHAPTER XCV.

### ESTATES IN REAL PROPERTY.

#### Section.

2366. Future estate, how limited.

2367. Contingent remainder, how created.

2368. Limitation of successive estates for life.

2369. Remainder must be in fee or for residue of term.

2370. Conditional limitation.

2371. Heirs of a tenant for life take how.

#### Section.

2372. Power of appointment, effect on future estate.

2373. Tenancy at will, how terminated.

2374. When landlord may re-enter.

2375. Re-entry when right is given in lease.

2376. Summary proceedings.

2377. Action for possession, when may be maintained.

**Section 2366. Future Estate, how Limited:** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

1887 R. S. Sec. 2850.

**FUTURE ESTATES:** The above section does away with the common law rule that a freehold could not be created to commence in futuro.—*Hawes v. Stebbins*, 49 Cal. 369; *Gant v.*

*Hunsucker*, 55 Am. Dec. 408, note 414; *Wellborn v. Weaver*, 63 Am. Dec. 235, note 243. Freeholds commencing in futuro.—*Chandler v. Chandler*, 55 Cal. 267; *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629.

**Section 2367. Contingent Remainder, how Created:** A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

1887 R. S. Sec. 2851.

**Section 2368. Limitation of Successive Estates for Life:** Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created.

1887 R. S. Sec. 2852.

**Section 2369. Remainder must be in Fee or for Residue of Term:** No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years, unless it is for the whole residue of such term.

1887 R. S. Sec. 2853.



**Section 2370. Conditional Limitation:** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

1887 R. S. Sec. 2854.

**CONDITIONAL LIMITATION:** An estate upon limitation differs from one upon condition in this, that the estate is determined ipso facto, by the happening of the contingency, and does not require an entry by the grantor in order to defeat it. A conditional limitation is an estate limited to take effect upon the happening of the con-

tingency, and which takes the place of the estate which is determined by such contingency. Conditional limitations are not recognized by the common law.—Tied. on Real Prop. Sec. 281. Contingent remainder: Tied. on Real Prop. Sec. 411 et seq.; *Starnes v. Hill*, 112 N. C. 1, 22 L. R. A. 598, 16 S. E. 1011; *Chilcott v. Hart*, 23 Colo. 40, 35 L. R. A. 41, 45 Pac. 391.

**Section 2371. Heirs of a Tenant for Life Take how:**

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder, so limited to them, and not as mere successors of the owner for life.

1887 R. S. Sec. 2855.

**REMAINDERS:** The above section of our Code abolishes the "Rule in Shelley's Case." This has been done in legislation in most all of our

states. For a discussion of the "Rule in Shelley's Case" see Tied. on Real Prop. Secs. 433-434; *Polk v. Faris*, 26 Am. Dec. 400, note 415.

**Section 2372. Power of Appointment, Effect on Future Estate:**

A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

1887 R. S. Sec. 2856.

**Section 2373. Tenancy at Will, how Terminated:**

A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice.

1887 R. S. Sec. 2857.

**TERMINATING ESTATE, ACTION FOR UNLAWFUL DETAINER:** The landlord may at any time terminate the estate at will by giving the notice required in this section, for at least one month. After such notice is given he has the right to re-enter. He may enforce this right by suit in ejectment without further notice, or by an action of unlawful detainer, after having given the three days' notice provided for in Section 2375. An action for unlawful detainer cannot be maintained against a tenant at will, without first terminating the tenancy by giving at least thirty days' notice in writing to quit, and afterwards giving three days' no-

tice in writing to surrender the possession; and these things must be made to appear by express averments in the complaint. This three days' notice is a prerequisite to the plaintiff's right to bring the action and cannot be waived by the defendant.—*Martin v. Splivalo*, 56 Cal. 128; *Smith v. Hill*, 63 Cal. 51; *King v. Connolly*, 51 Cal. 181; *Joy v. McKay*, 70 Cal. 445, 11 Pac. 763; *Fish v. Benson*, 71 Cal. 428, 12 Pac. 454; *Stedman v. McIntosh*, 42 Am. Dec. 122.

Action in ejectment: Code Civ. Pro. Sec. 3379.

Action for unlawful detainer: Code Civ. Pro. Sec. 3977.

Changing terms of tenancy: Sec. 2384.

**Section 2374. When Landlord may Re-Enter:** After such notice has been served, and the period specified by such notice

has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession.

1887 R. S. Sec. 2858.

**Section 2375. Re-Entry when Right is Given in Lease:** Whenever the right of re-entry is given to a grantor or a lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in the Code of Civil Procedure.

Sec. 2373 and note.

1887 R. S. Sec. 2859.

**Section 2376. Summary Proceedings:** Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully detained, are provided for in the Code of Civil Procedure.

1887 R. S. Sec. 2860.

**Section 2377. Action for Possession, when may be Maintained:** An action for the possession of real property, leased or granted, with a right of re-entry, may be maintained at any time, in the district court, after the right to re-enter has accrued without notice.

1887 R. S. Sec. 2861.

## CHAPTER XCVI.

### RIGHTS AND OBLIGATIONS OF OWNERS.

#### Section.

- 2378. Rights of grantee respecting rents.
- 2379. Liabilities of assignee of lessee.
- 2380. Rights of assignee of lessee.
- 2381. Rent upon lease for life, how recovered.
- 2382. Rent dependent on life, when recovered.
- 2383. Reversioner, etc., may maintain action.

#### Section.

- 2384. Terms of lease from month to month, how changed.
- 2385. What tenant may remove from premises.
- 2386. Fixtures.
- 2387. Boundaries along highways.
- 2388. Right to lateral and subjacent support.
- 2389. Duties of tenant for life.
- 2390. Obligations of coterminous owners.

#### **Section 2378. Rights of Grantee Respecting Rents:**

A person to whom any real property is transferred or devised, upon which rent has been reserved or to whom such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.

1887 R. S. Sec. 2875.

**PROPERTY TRANSFERRED, RENTS** A transfer of premises, upon which rent is due, does not bind the tenant until he has notice of such transfer, and such notice must be given before grantee can demand rent. A refusal of the tenant to pay rent to grantee before notice does not forfeit the lease; and if tenant pay grantor in ignorance of the transfer he is not liable to grantor for rent.—O'Connor v. Kelley, 41 Cal. 43. See Sec. 2414.

One who purchases at a sheriff's sale the interest of the landlord is entitled to the rent from the time of purchase, and during the time for redemption.—Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 593; Harris v. Reynolds, 13 Cal. 515; Walker v. McCusker, 71 Cal. 594, 12 Pac. 723; Clement v. Shipley, 2 N. D. 432, 51 N. W. 414; Harris v. Foster, 97 Cal. 292, 32 Pac. 246, 33 Am. St. Rep. 189; Otis v. McMillan, 70 Ala. 55; Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958; Walls



v. Walker, 37 Cal 424, 99 Am. Dec. 290. 194, 43 Pac. 25, 44 Pac. 531; Reay v. note 296; Knipe v. Austin, 13 Wash. Cotter, 29 Cal. 169.

**Section 2379. Liability of Assignee of Lessee:** Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee for any cause of action accruing while they are such assignees except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises.

1887 R. S. Sec. 2876.

The mortgagee of a growing crop planted by a tenant under a contract which entitles the landlord to a portion of the crop, only succeeds to the in-

terest of the mortgagor.—Sunol v. Molloy, 63 Cal. 369; Stockton S. and L. Soc. v. Purvis, 112 Cal. 243, 53 Am. St. Rep. 215, 44 Pac. 561; Riddle v. Dow, 98 Iowa, 29, 66 N. W. 1066.

**Section 2380. Rights of Assignee of Lessee:** Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances or relating to the title or possession of the premises.

1887 R. S. Sec. 2877.

**Section 2381. Rent Upon Lease for Life, How Recovered:** Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

1887 R. S. Sec. 2878.

**Section 2382. Rent Dependent on Life, When Recovered:** Rent dependent on the life of a person may be recovered after as well as before his death.

1887 R. S. Sec. 2879.

**Section 2383. Reversioner, Etc., May Maintain Action:** A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or for years, and although after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

1887 R. S. Sec. 2880.

**Section 2384. Terms of Lease from Month to Month, How Changed:** In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month.

1887 R. S. Sec. 2881.

Termination of tenancy at will See 2373, and note.

**Section 2385. What Tenant May Remove From Premises:** A tenant may remove from the demised premises, at any time during the continuance of his term, anything affixed thereto for the purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing done has, by the manner in which it is affixed, become an integral part of the premises.

1887 R. S. Sec. 2882.

Fixtures Sec. 2348, note.

**Section 2386. Boundaries Along Highways:** An owner of land bounded by a road or street, is presumed to own to the center of the way, but the contrary may be shown.

1887 R. S. Sec. 2883.

**BOUNDING ON STREET OR ROAD** Land described in a deed as bounded by a public highway or street will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street a boundary instead of the center.—*Moody v. Palmer*, 50 Cal. 31; *Webber v. Railroad Co.* 51 Cal. 425; *Kittle v. Pfeiffer*, 22 Cal. 485; *Watkins v. Lynch*, 71 Cal. 21, 11

Pac. 808; *Abbott v. Mills*, 23 Am. Dec. 222, note 230; *Weyl v. Railroad Co.* 69 Cal. 202, 10 Pac. 510; *M. Co. v. Williams*, 70 Cal. 534, 12 Pac. 530; *Newhail v. Ireson*, 54 Am. Dec. 790, note 793; *Winter v. Payne*, 33 Fla. 478, 15 So. 211; *Fraser v. Ott*, 95 Cal. 661, 30 Pac. 793; *Gormley v. Clark*, 134 U. S. 338, 33 L. Ed. 909. Boundary when limited by the margin of a river.—*Allen v. Weber*, 27 Am. St. Rep. 51, note 56.

**Section 2387. Right to Lateral and Subjacent Support:** Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjacent land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.

1887 R. S. Sec. 2884.

**LATERAL SUPPORT:** A coterminous land owner in making excavations for the purpose of building is not required to sustain the weight of the building upon adjacent land, unless the right to have such building sustained has been acquired as an easement. By giving notice of his intention to excavate and conducting his work so that the soil without the weight of the building would not have fallen, his whole duty is performed. By the giving of the notice, the coterminous proprietors are relegated to their common law

rights and duties. The object of the notice is that the owner of the building may have his attention called to the work and if necessary shore up his wall or strengthen his foundation.—*Aston v. Nolan*, 63 Cal. 269; *Conboy v. Dickenson*, 92 Cal. 600; 28 Pac. 809; *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. 209; *Green v. Berge*, 105 Cal. 52; 45 Am. St. Rep. 25, 38 Pac. 539. For a complete discussion regarding the rights and duties of coterminous land owners, see *Larson v. Metropolitan St. Ry. Co.* 33 Am. St. Rep. 439 and note 445; *Charles v. Rankin*, 66 Am. Dec. 642, and note 647.

**Section 2388. Duties of Tenant for Life:** The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

1887 R. S. Sec. 2885.

**DUTIES OF LIFE TENANT:** Taxes upon city property and assessments thereon for street improvements must be paid by the life tenant.—*Roche v. Waters*, 72 Md. 264, 7 L. R. A.

533, 19 Atl. 535. Also, ordinary taxes.—*Varney v. Stevens*, 22 Me. 331. Must keep premises in repair.—*Kearney v. Kearney*, 17 N. J. Eq. 59; *Id.* 504; *Wilson v. Edmonds*, 24 N. H. 517. But is not bound to expend extraordinary



sums.—Id.; Brooks v. Brooks, 12 S. C. 422. Nor to rebuild buildings destroyed by act of God.—Id. Expenses of collecting and disbursing the income of a trust estate should be borne by the life tenant.—Hite v. Hite (Ky.), 19 L. R. A. 173, 20 S. W. 778. Expenses of modern improvements in buildings.—Greene v.

Greene, 19 R. I. 619, 35 Atl. 1042, 35 L. R. A. 790. Purchasing outstanding legal title.—27 Or. 117, 39 Pac. 1105. Purchase at tax sale.—Allen v. De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626, note 628.  
Disposition of life estate on owner's death: Code Civ. Proc. Sec. 4281.

**Section 2389. Obligations of Coterminous Owners:**  
Coterminous owners are mutually bound equally to maintain:

- 1. The boundaries and monuments between them;
- 2. The fences between them, unless one of them chooses to let his land lie without fencing, in which case, if he afterwards incloses it, he must refund to the other, just proportion of the value, at that time, of any division fence made by the latter.

1887 R. S. Sec. 2886.  
**PARTITION FENCES:** If the owner of land encloses it with a fence, and the owner of an adjoining tract afterwards enclose his land, so that such fence answers the purpose of a division fence, the owner of the adjoining tract must pay the person who built the fence one half the value, or so much of it it, as answers for a partition fence between them.—Gonzales v. Wasson, 51 Cal. 295. Partition fences are the joint property of the adjoining proprietors, and upon each is enjoined the duty of keeping them in good repair. And if one party, after application to the other to repair a partition fence, and his refusal so to do, performs the necessary work himself, he may recov-

er therefor.—Walker v. Watrous, 8 Ala. 493, 42 Am. Dec. 646. For a full discussion of the subject of partition fences, see note to Myers v. Dodd, 68 Am. Dec. 626. The doctrine of contribution is not so much founded on contract as the principle of equity and justice, that where the interest is common, the burden also should be common.—Campbell v. Meiser, 8 Am. Dec. 570. Where one of the owners pulls down a party wall which was ruinous, and rebuilds it anew, the owner of the adjoining property is not bound to contribute to build the new wall higher than the old one, nor if material more costly or of a different nature, is used, is he bound to pay any part of the extra expense.—Id.

**CHAPTER XCVII.**  
**TRANSFERS IN GENERAL.**

- Section.  
2390. Mere possibility cannot be transferred.  
2391. Right of re-entry may be transferred.  
2392. Thing in action may be transferred.  
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- Section.  
2394. Transfer without writing when valid.  
2395. Transfer in writing called what.  
2396. Words of inheritance unnecessary to transfer fee.  
2397. Meaning of "Heirs" or "Issue" in certain grants.  
2398. What grant constitutes tenancy in common.

**Section 2390. Mere Possibility Cannot be Transferred:** A mere possibility not coupled with an interest, cannot be transferred.

1887 R. S. Sec. 2900.  
**TRANSFER OF POSSIBILITIES:** Expectation or hope of succeeding to an ancestor's property is a mere or remote possibility in which there is no existing right that can be the subject of release.—Needles vs. Needles, 70 Am. Dec. 85. Similarly, a child has no interest in his parent's estate during the lifetime of the parent that is vendible

or devisable.—Miller v. Wheeler, 74 Am. Dec. 421. In Cole v. Raymond, 9 Gray, 218, the court said: "It is a well established rule in law, that although a deed, as a present conveyance transfers only the title which the grantor then has, yet if it is a deed in fee with warranty, it has a further operation as a covenant real running with the land, by which the grantor and his heirs are

bound to make it good. So that if the grantor has no good and sufficient title to the estate, yet if he or they afterwards acquire a good title, it forthwith inures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel; if the action be brought in such form that it may be pleaded by way of estoppel; otherwise by way of rebuttal to the claim of any one bound by such warranty."

**Section 2391. Right of Re-Entry May be Transferred:** A right of re-entry or of re-possession for breach of condition subsequent, can be transferred.

1887 R. S. Sec. 2901.

The right of re-entry for breach of a condition subsequent is a possibility coupled with an interest.—*Jackson ex dem Varick v. Waldron*, 13 Wend. 178. At common law, the failure to perform a condition subsequent containing a doubt can be taken advantage of only by the grantor, his heirs or devisee.—*Boone v. Clark*, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850. And it is held that where one has transferred real estate by deed containing a condition subsequent, the assignee of the grantor may

Courts of equity will support assignments not only of choses in action and the contingent interests and expectancies, but also of things which have no present actual or potential existence but rest in mere possibility; not indeed as a present positive transfer operating in praesenti for that can only be of a thing in esse; but as a present contract to take effect and attach as soon as that thing becomes in esse.—2 Story Eq. Jur. Sec. 1040.

have mandamus to enforce the condition.—*Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363. The grantor's right of re-entry for breach of condition subsequent by the grantee in fee is not an estate or interest in real property within the meaning of the statute permitting such estate to be devised, but notwithstanding a will containing a general residuary clause, the right to re-enter belongs to the heir without the grantor's decease.—*Upington v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359.

**Section 2392. Thing in Action May be Transferred:** A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

1887 R. S. Sec. 2891.

AT COMMON LAW: Choses in action are not assignable at common law, and the assignee of the choses in action can only bring suit in the name of the assignor unless statute makes choses in action assignable.—*Glenn v. Marbury*, 145 U. S. 499.

TORTS: The weight of authority is that a chose in action, if the tort is merely personal, is not assignable.—*People v. Tioga C. P.* 19, Wend. 73; *Gardener v. Adams*, 12 Wend. 297;

*Whitaker v. Gavit*, 18 Conn. 522. And that a claim arising out of a tort which affects the estate of the person may be assigned.—*Dahms v. Sears*, 13 Or. 47, 11 Pac. 891. The exception to the assignability of choses in action is confined to wrong done to the person, the reputation or the feelings of the injured party, and to contracts of a merely personal nature, like promises of marriage.—*Meech v. Stoner*, 19 N. Y. 29.

**Section 2293. Property Held Adversely May be Transferred:** Any person claiming title to real property in the adverse possession of another, may transfer it with the same effect as if in actual possession.

1887 R. S. Sec. 2902; 1875 Compiled Laws, p. 602, Sec. 34.

At common law the transfer of real estate by a claimant not in possession is valid.—*Jackson v. Demont*, 6 Am. Dec. 259. In Kentucky, by the act of

1878, purchasers of interest or claims to land held under the laws of Virginia, were permitted, and under that act a deed of bargain and sale of land held adversely by another was held to convey the title, and the purchaser was



held to have the right to maintain a writ of right without having been actually seized.—Conn v. Manifee, 12 Am. Dec. 417. Now, however, a statute in Kentucky reinstates the old common law rule as above set forth.—Swager v. Crutchfield, 9 Bush. 411. In Ohio, how-

ever, in the absence of any statute, it was held that a deed of release is a substantive mode of conveyance and transfers title although at the time of its execution, the promises were in the adverse possession of another.—Hall's Lessee v. Ashby, 34 Am. Dec. 424.

**Section 2394. Transfer Without Writing, When Valid:** A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

1887 R. S. Sec. 2903.  
What contracts must be in writing.  
See Sec. 2739.  
Conveyances by instruments in writ-

ing: See Sec. 2399 et seq.  
Mortgages must be in writing: See Sec. 2801.

**Section 2395. Transfer in Writing, Called What:** A transfer in writing is called a grant, or conveyance, or bill of sale.

1887 R. S. Sec. 2904.

**Section 2396. Words of Inheritance Unnecessary to Transfer Fee:** Words of inheritance or succession are not requisite to transfer a fee in real property.

1887 R. S. Sec. 2905.  
**LIMITATION OF TITLE:** Under the section, a deed which in its granting part simply grants, bargains and sells the land, without any words of inheritance, conveys a fee-simple, but the title thus conveyed may be limited in the habendum clause to an estate for

life. — Montgomery v. Sturdivant, 41 Cal. 290.

**ABROGATION OF COMMON LAW:** At the common law a grant of land to a man forever, conveyed only a life estate if the word "heirs" was omitted. —Litt. Book 1, Sec. 1; 4 Kent. Comm. 6.

**Section 2397. Meaning of "Heirs" or "Issue" in Certain Grants:** Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.

1887 R. S. Sec. 2906; 1875 Compiled Laws, p. 604, Sec. 45.

**OBJECT OF THE PROVISION:** The object of this provision is to do away with the construction that such words refer to indefinite failure of issue and to settle a controversy in the courts upon the subject.—Rathbone v. Dyckman, 3 Paige 8.

**COMMON LAW:** Prior to this statute, a grant to a person for life with limitation over in case of his death without issue, is liable to be considered to mean not only the failure of the issue of such person, but the failure of the issue of such issue at any future time, however remote. Such limita-

tions were held void as too remote, but are good under this section.—Patterson v. Ellis' Heirs, 11 Wend. 259; Miller v. Macomb, 26 Wend. 229.

**MEANING OF "ISSUE:":** The word "issue" may in some cases designate children only, depending upon the intention as disclosed in the will or deed; where its meaning is not restrained by the context, it is to be interpreted as synonymous with descendant and as comprehending objects of every degree. The rule applies whether the word is used in a bequest deed or devise.—Soper v. Brown, 136 N. Y. 241, 32 N. E. 768.

**Section 2398. What Grant Constitutes Tenancy in Common:** Every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such, constitutes a tenancy in common, unless expressly declared in the grant or devise to be otherwise.

1887 R. S. Sec. 2907; 1875 Compiled Laws, p. 603, Sec. 43.

**TRANSFERS BETWEEN COTENANTS:** A person regularly deriving title from one cotenant will be regarded as a tenant in common of the property with the other cotenants.—*Dain v. Cowing*, 39 Am. Dec. 585.

**EXECUTORS:** A deed to three persons vests title in them as tenants in common, though they are described as executors, there being nothing in the deed to show that the estate was intended to be vested in them as trus-

tees.—*Bank of Utica v. Mersereau*, 49 Am. Dec. 189.

**CREATION BY WILL:** Tenancy in common is created by will, and devisees take by purchase and not by descent, as the will does not pass the same estate in quality or quantity that they would have taken as heirs at law, where a testator devised "all the rest and residue of my estate \* \* \* \* \* to be divided amongst all my children, in equal portions and shares to them, their heirs and assigns forever."—*Gilpin v. Hollingsworth*, 56 Am. Dec. 737.

## CHAPTER XCVIII.

### TRANSFER OF REAL PROPERTY.

#### Section.

- 2399. Conveyances, how made.
- 2400. No estate in real property created except by writing.
- 2401. Cases not affected by preceding section.
- 2402. When husband and wife must join in conveyance.
- 2403. Conveyance by married woman, husband must join.
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- 2405. Power of attorney of married woman.
- 2406. Attorney in fact, how must execute instrument.
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#### Section.

- 2409. Subsequently acquired title passes by operation of law when.
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- 2415. Transfer of land along highways, what passes.
- 2416. Effect of word "grant" in conveyance.
- 2417. Incumbrance, what it includes.
- 2418. Lineal and collateral warranties abolished.

**Section 2399. Conveyance, How Made:** A conveyance of an estate in real property may be made an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

1887 R. S. Sec. 2920; 1875 Compiled Laws, p. 596, Sec. 1.

**DESCRIPTION IN CONVEYANCE:** If a direction or course given in a deed is impossible or senseless, it must be omitted or disregarded; and, if the other calls or parts of description are sufficient to identify the land conveyed, the deed must be sustained.—*Brose v. Boise City Railroad & Terminal Co.* (Idaho), 51 Pac. 753.

A deed conveying certain property described therein, and containing also

a clause conveying to the grantee all of the property, real, personal and mixed, belonging to the grantor, and located in a certain county, held, sufficient to convey property not described in said deed owned by the grantor in said county at the date of the execution of said deed.—*Idaho Gold Mining Co. v. U. M. & M. Co.* (Idaho), 47 Pac. 95; *Brown v. Warren*, 16 Nev. 228; *Land Co. v. Randall* (Iowa), 47 N. W. 905.

**Section 2400. No Estate in Real Property Created Except by Writing:** No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in



writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

1887 R. S. Sec. 6007.

**REQUISITES FOR TRANSFER OF CERTAIN ESTATES:** A verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract.—*McGinniss v. Stanfield* (Idaho), 55 Pac. 1020; *Hill v. Den*, 121 Cal. 42, 53 Pac. 642. Where there has been a part performance by the grantee who has been put in possession of premises, the contract is valid.—*Id.* Sufficiency of a memorandum to make a valid contract in writing for the sale of real estate.—*Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. Rep. 514, 25 N. E. 1044. A sale of land at auction where no note or memorandum is made by the auctioneer and no writing exists between the parties is void.—*People v. White*, 6 Cal. 75. A release of an equitable estate in land can only be proved by a deed or conveyance in writing subscribed by the party granting the same, or his lawful agent, thereunto authorized in writing.—*Hoen v. Simmons*, 1 Cal. 119; *Videau v. Griffin*, 21 Cal. 390; *Millard v. Hathaway*, 27 Cal. 119. A verbal agreement made by a vendee, when he

receives a conveyance, to re-convey the land to the vendor, if he does not pay the purchase money when demanded, by the vendor, is void.—*Gallagher v. Mars*, 50 Cal. 23; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. 429; *Wood v. Wood*, 124 Ind. 551, 24 N. E. 751; *Hutzler v. Phillips*, 4 Am. St. Rep. 687, note 696-708. This rule applies to conveyances made by a corporation as well as to conveyances made by an individual.—*Smith v. Morse*, 2 Cal. 524. A writing is not necessary to vest or divest title on taking up a mining claim, and verbal authority of one man to take up a claim for another is sufficient.—*Gore v. McBrayer*, 18 Cal. 583; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803; *Hibour v. Reeding*, 3 Mont. 21; *Raymond v. Johnson*, 17 Wash. 237, 49 Pac. 492; *Book v. J. M. Co.* 58 Fed. 119. See *Moore v. Hammerslag*, 109 Cal. 124, 41 Pac. 805, and cases therein cited, and section 2739 of this Code.

*Stowell et al. v. Tucker*, (Idaho) 62 Pac., 1033.

**Section 2401. Cases not Affected by Preceding Section:** The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement in case of part performance thereof.

1887 R. S. Sec. 6008.

62 Pac., 1033.

*Stowell et al. v. Tucker*, (Idaho), *Male v. Leflang* (Idaho), 63 Pac. 108.

**Section 2402. When Husband and Wife Must Join in Conveyance:** No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or incumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or incumbered, and it be acknowledged by the wife as provided in Chapter XCIX of this Title.

1887 R. S. Sec. 2921.

**TRANSFER OF HOMESTEAD, OR RESIDENCE PROPERTY:** The only estate or interest the wife has in that portion of the community property which is occupied as a residence and not dedicated as a homestead is subject to the control of the husband except as to alienation or incumbrance as prescribed in the above section. And the residence can be changed or aban-

doned at any time by the husband without the consent of the wife, and when such change or abandonment has taken place, the property is again under the absolute control of the husband unless the same has been dedicated as a homestead as provided by law.—*Law v. Spence* (Idaho), 48 Pac. 282. A mortgage given by the husband for the purchase price of real estate, whether the mortgage was given to the vendor,

or to a third person who as a part of the same transaction, advances the purchase money, is a purchase price mortgage, and is a valid lien on said land, whether signed by the wife or not, and is a prior lien to any right she

may have to said land as community property by reason of having resided thereon at the date of the execution of said mortgage.—*Kneen v. Halin* (Idaho), 59 Pac. 14; *Stowell et al. v. Tucker* (Idaho), 62 Pac. 1033.

**Section 2403. Conveyance by Married Women, Husband Must Join:** No estate in the real property of a married woman passes by any grant or conveyance purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed in Chapter XCIX of this Title, and her husband, if a resident of the State, joins with her in the execution of such grant or conveyance.

1887 R. S. Sec. 2922; 1875 Compiled Laws, p. 600, Sec. 20.

Acknowledgments by married women: Sec. 2425, and note.

A separate deed by the wife is ineffectual to pass title to her separate estate. Both husband and wife must join in the conveyance.—*Clark v. Clark* (Or.), 18 Pac. 1; *Buchanan v. Hazzard*, 95 Pa. 240; *Cook v. Walling*, 117 Ind. 9, 10 Am. St. Rep. 17, 19 N. E. 532; *Cravens v. White*, 73 Tex. 577, 15 Am. St. Rep. 803, 11 S. W. 543. A deed from a married woman of her separate estate is not void because it was not signed at the time of its execution and delivery, by her husband, if it is afterwards signed and acknowledged by the husband.—*Andola v. Picott* (Idaho), 46 Pac. 928. A deed signed by the wife alone is sufficient to convey color of title.—*Wright v. Kleyla*, 104 Ind. 223, 4 N. E. 16. See *Stevens v. Holman*, 112 Cal. 345, 44 Pac. 670; *Simons v. Bedell*, 122 Cal. 341, 55 Pac. 3. The consent of the husband is required not only to the

sale by the wife of her separate property but also to her conveyance of the same, and that assent must be expressed by his signature to the conveyance made by himself, and he cannot by a letter of attorney, delegate to another the power to subscribe his name to such conveyance.—*Meagher v. Thompson*, 49 Cal. 189; *Gagliardo v. Dumont*, 54 Cal. 500. Statutes empowering a wife to convey her real property by joining with her husband in a deed of conveyance, are for the benefit of the wife, and not of the husband, and any construction thereof which would result in making it more easy for the husband to secure control of the estate of the wife would tend to defeat the object of the law. And the husband and wife cannot legally convey her separate real estate to the husband, and a deed of trust to the husband, executed by the husband and wife jointly, passes no title.—*Rico v. Brandenstein*, 98 Cal. 465, 33 Pac. 480, 35 Am. St. Rep. 192.

**Section 2404. Conveyance When Husband is a Non-Resident:** If her husband has not been a bona fide resident of the State at any time within the year next preceding her conveyance, a married woman may convey her separate real property, or any interest therein, by an instrument in writing, by her subscribed, and acknowledged by her in the manner required by Chapter XCIX of this Title.

1887 R. S. Sec. 2923.

Acknowledgments of married women: Sec. 2425.

Husband must join in conveyance of her real property: Sec. 2403, and note.

**Section 2405. Power of Attorney of Married Women:** A power of attorney of a married woman, authorizing the execution of an instrument transferring an estate in her separate real property, has no validity for that purpose until acknowledged by her in the manner provided in Chapter XCIX of this Title, and her husband, if a resident of the State, joins therein. But if her husband has not been a bona fide resident of the State at any time within one year next preceding the execution of the power, she may execute the same alone,



as in the last Section provided for the execution by her of conveyances when her husband is a non-resident.

1887 R. S. Sec. 2924.

A joint power of attorney from the husband and wife is effectual to authorize the attorney in fact to execute a lease of the separate estate of the wife.—*Douglas v. Fulda*, 50 Cal. 77. And it has been held in the following cases that the husband may be attor-

ney in fact of his wife.—*Racouillat v. Sansevain*, 32 Cal. 376; *Munger v. Baldridge*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159; *Wilkinson v. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. 614. But this would not seem to be true under the statutes of this state.—Section 2403, and note.

**Section 2406. Attorney in Fact, How Must Execute Instrument:** When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

1887 R. S. Sec. 2925.

**EXECUTION BY ATTORNEY IN FACT:** A conveyance executed by an attorney in fact must be executed in the principal's name, or it will not be sufficient to convey his property.—*Echols v. Cheney*, 28 Cal. 157; *Love v. S. M. L. W. & M. Co.* 32 Cal. 639. In the case of *Southern Pac. Co. v. Dredge Co.* 118 Cal. 371, 50 Pac. 650, it is held that parol evidence may be introduced to show that a contract, signed by one as president of a company, was the contract of the company, and not of the individual. A principal, who has received the purchase money, of a sale made by his attorney in fact, can not question the authority of his attorney to execute the conveyance.—*Hunter v.*

*Watson*, 12 Cal. 362, 73 Am. Dec. 543. Authority of an attorney in fact must be in writing.—*Videau v. Griffin*, 21 Cal. 390. Authority of an attorney in fact must be shown.—*Ter. v. Klee*, 1 Wash. 187, 23 Pac. 417; *Davenport v. Parsons*, 81 Am. Dec. 772, note 776; *Mowry v. Mowry*, 103 Cal. 314, 37 Pac. 398. The fact that the execution was in the presence of the principal must be affirmatively established by the party who relies upon it as an excuse for the absence of a power in writing.—*Videau v. Griffin*, 21 Cal. 390; *Hogans v. Carruth*, 19 Fla. 89; *Lewis v. Watson*, 98 Ala. 481, 39 Am. St. Rep. 84, 13 So. 570; *Finnegan v. Lucy*, 157 Mass. 41, 32 N. E. 656; *Davenport v. Parsons*, *supra*.

**Section 2407. What Easements Pass With Property:** A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

1887 R. S. Sec. 2926.

**TRANSFER CARRIES EASEMENTS:** The general rule of law is that when a party grants a thing, he by implication grants whatever is incident to it and necessary for its beneficial enjoyment.—*Cave v. Crafts*, 53 Cal. 135; *Farmer v. Water Co.* 56 Cal. 11; *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409; *Eshelman v. Snyder*, 82 Ind. 502; *Frank v. Hicks*, 4 Wyo. 530, 35 Pac. 475, 1025; *Tucker*

*v. Jones*, 8 Mont. 231, 19 Pac. 571. *Simmons v. Winters*, 21 Or. 45, 28 Am. St. Rep. 733, 27 Pac. 7; *Quinlan v. Noble*, 75 Cal. 25, 17 Pac. 69; *Life Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550, 2 N. E. 188; *Scheel v. Alhambra Min. Co.* 79 Fed. 825; *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377, note 381; *Elliott v. Rhett*, 57 Am. Dec. 750, note 759; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Kennedy v. Burnap*, 120 Cal. 488, 52 Pac. 843.

**Section 2408. When Fee Simple Title Presumed:** A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

1887 R. S. Sec. 2927.

**QUIT CLAIM DEED:** A purchaser

of real estate who takes a quit claim deed from his grantor, is presumed to

have notice of any defect in his own risk.—*Leland v. Isenbeck*, 1 Idaho, 469.  
grantor's title; and he purchases at his

**Section 2409. Subsequently Acquired Title Passes by Operation of Law, When:** When a person purports by proper instrument to convey or grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law of the grantee, or his successors.

1887 R. S. Sec. 2928; 1875 Compiled Laws, p. 602, Sec. 33.

**AFTER-ACQUIRED TITLE:** Where one sells and conveys land to which he has no title, but afterwards acquires title, this title inures to the benefit of his grantee.—*McWilliams v. Nisly*, 7 Am. Dec. 654; *Brown v. McCormick*, 31 Am. Dec. 450; *Washabaugh v. Entriken*, 34 Pa. St. 74. After acquired title will not pass, where grantor does "grant, sell and convey" to the grantee all his "right and interest," etc.—*Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575. A bargain and sale deed will pass the title subsequently acquired at sheriff's sale in foreclosing a mortgage existing

before such deed was given.—*Green v. Clark*, 31 Cal. 591; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449, note 458. And generally a bargain and sale deed carries with it an after-acquired title.—*Dalton v. Hamilton*, 50 Cal. 422. A deed of title in fee simple.—*Green v. Green*, 103 Cal. 108, 37 Pac. 188. A quit claim deed does not pass after-acquired title.—*Bogy v. Shoab*, 13 Mo. 365; *Simpson v. Greeley*, 8 Kan. 586; *San Francisco v. Lawton*, 18 Cal. 465; *Quivey v. Baker*, 37 Cal. 465; *Myers v. Reed*, 9 Saw. 139, 17 Fed. 406. For an exhaustive discussion of this question see note to *Frink v. Darst*, 58 Am. Dec. 583-589.

**Section 2410. Conveyance, Conclusive Against Grantor:** Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded.

1887 R. S. Sec. 2929.

**PRIOR RECORD OF SUBSEQUENT INSTRUMENT:** As between purchasers, it is only subsequent purchasers for a valuable consideration, in good faith, who are protected against a prior unrecorded conveyance.—*Morse v. Wright*, 60 Cal. 260.

In order to be a bona fide purchaser for value one must have paid his money without any notice of the outstanding, unrecorded, prior conveyance.—*Scott v. Umbarger*, 41 Cal. 410; *Blight v. Banks*, 17 Am. Dec. 136, note 157; *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641; *Davis v. Ward*, 109 Cal. 186; 50 Am. St. Rep. 29, 41 Pac. 1010; *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267.

**ATTACHMENT:** Under a similar statute in Colorado it was held that an attachment by a creditor who had no notice of an outstanding unrecorded

conveyance, gave such attaching creditor a prior lien to such conveyance.—*Jerome v. Bank*, 22 Colo. 37, 43 Pac. 215; *Wahrenberger v. Waid*, 8 Colo. App. 200, 45 Pac. 518. If attaching creditor has notice, his lien will be inferior to such unrecorded conveyance.—*Campbell v. Bank*, 22 Colo. 177, 43 Pac. 1007. Sufficiency of notice.—*Id.*; *Wahrenberger v. Waid*, *supra*.

In California it was held that a writ of attachment was not an "instrument" within the sense of that term as used in the above section: and therefore, a deed, executed prior to the levy of an attachment upon property conveyed, though not recorded until after the levy, will prevail over the attachment.—*Hoag v. Howard*, 55 Cal. 564; *Morrow v. Graves*, 77 Cal. 218, 19 Pac. 489; *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930.

**Section 2411. Grant by Owner of Life Estate. What Passes:** A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

1887 R. S. Sec. 2930.



**Section 2412. Defeat of Grant on Condition Subsequent, Duty of Grantee:** Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must recover the property to the grantor or his successors by grant, duly acknowledged for record.

1887 R. S. Sec. 2931.

**CONDITION SUBSEQUENT:** Where a deed was executed and delivered upon the condition that the grantee should pay certain indebtedness contracted by the grantee and the grantor, and also a certain note and mortgage executed by the grantor, and release him from any, and all liability, upon such indebtedness, and it was understood and agreed by and between said parties that said deed was not to become operative or pass title until payment had been made of such indebtedness, upon the failure of the grantee to comply with said conditions, the grantor was entitled to have such deed cancelled.—*Steffy v. Esler* (Idaho), 55 Pac. 239. Where the condition subsequent in a deed was, that the grantee should maintain a lumber yard thereon for the period of five years, and such lumber yard was maintained for a period of less than one year, the grantor was entitled to maintain an action to compel a reconveyance for the breach of the condition, and to remove the cloud caused by the record of the grantee's deed.—*Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702; *Liebrand v. Otto*, 56 Cal. 242. What constitutes a breach of conditions subsequent.—good faith. Sec. 2410, and note.

*Gross v. Carson*, 44 Am. Dec. 742, note 743. Non-performance of an illegal condition subsequent, as the procurement of witnesses to testify to a particular fact, does not prevent the vesting of the legal title in the grantee.—*Patterson v. Donner*, 48 Cal. 369. And in the case of *Spect v. Gregg*, 51 Cal. 198, it was held that a deed on condition subsequent passes the title to the grantee; and in *Cayton v. Walker*, 10 Cal. 451, certain stipulations in a deed as to the manner of paying the purchase price were held a trust and not a condition subsequent, which would defeat the grant. The recording of the conveyance containing conditions puts a subsequent purchaser on inquiry as to the performance of the conditions.—*Brannan v. Mesick*, 10 Cal. 95.

In an option to purchase a mining claim, where time is of the essence of the contract, it is obligatory upon the would-be purchaser to perform the stipulations by him to be performed within the time specified in the contract. If he fails to do so, his option to purchase may be forfeited.—*Idaho Gold Mining Co. v. Union M. & M. Co.* (Idaho), 47 Pac. 95. Unrecorded deed void as to subsequent purchaser in

**Section 2413. When Purported Grant is an Executory Contract:** An instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property.

Upon compliance with the condition, the grantee is entitled to a grant or conveyance from the grantor or his successors, for the property, duly acknowledged for record.

1887, R.S. Sec. 2932.

**CONDITION PRECEDENT:** Where the grantor puts it beyond the power of the grantee to perform the conditions precedent, the failure to perform will be excused.—*Houghton v. Steele*, 58 Cal. 421; *Griffith v. Happersberger*, 86 Cal. 605, 25 Pac. 137. Conditions precedent must be strictly and punctually performed before the estate can vest or be enlarged.—*Brannan v. Mesick*,

10 Cal. 95. If the owner of land makes an absolute conveyance of the same and afterward makes conveyance to the grantee, or his assigns, loaded with conditions, the conditions cannot operate, for there is no estate remaining in the grantor upon which the conditions can take effect.—*Aleman v. Daly*, 36 Cal. 90. See *Pennington v. Pennington*, 70 Md. 418, 3 L. R. A. 816, 17 Atl. 329.

**Section 2414. Grants of Rents, Etc., Good Without Attornments:** Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no

tenant who, before notice of the grant, has paid rent to the grantor, must suffer any damage thereby.

1887 R. S. Sec. 2933.

Notice of grant, rents due: Sec. 2378 and note.

**Section 2415: Transfer of Land Along Highway, What Passes:** A transfer of land bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front, to the center thereof, unless a different intent appears from the grant.

1887 R. S. Sec. 2934.

Transfer bounded by highway: Sec. 2386, and note.

**Section 2416. Effect of Word "Grant" in Conveyance:** From the use of the word "grant" in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee;

2. That such estate is, at the time of the execution of such conveyance free from incumbrances done, made, or suffered, by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

1887 R. S. Sec. 2935; 1875 Compiled Laws, p. 604, Sec. 51.

**GRANT:** The word "grant" or "grant, bargain, sell, release, remise and convey," is sufficient to convey a legal title and transfer all the interest which the grantor possesses at the time of the execution of the deed.—Packard v. Moss, 68 Cal. 123, 8 Pac. 118; Muller v. Boggs, 25 Cal. 175. The operative words of release in a simple quit claim deed are "remise, release, and quit-claim."—Touchard v. Crow, 20 Cal. 150. The word "grant" is effectual to convey an estate in a corporeal hereditament. It has become a generic term applicable to the transfer of all classes of real property.—S. F. & O. R. R. Co.

v. Oakland, 43 Cal. 502. At common law, a covenant of seisin is not implied in a deed of real property by the use of the operative words "grant, bargain, sell, convey and warrant."—Aiken v. Franklin, 42 Minn. 91, 6 L. R. A. 360, 43 N. W. 839. The fact that the title to the land conveyed by a "grant, bargain and sale" deed, stands in a third person, does not constitute a breach of the covenants implied in such deed.—Bryan v. Swain, 56 Cal. 616; Maddock v. Russell, 109 Cal. 417, 42 Pac. 139. There are no implied covenants arising from a quit-claim deed.—McDonough v. Martin, 88 Ga. 675, 18 L. R. A. 343, 16 S. E. 59.

**Section 2417. Incumbrance, What Includes:** The term "incumbrances" includes taxes, assessments, and all liens upon real property.

1887 R. S. Sec. 2936.

**Section 2418. Lineal and Collateral Warranties Abolished:** Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in or to any real property, are answerable upon such covenant or agree-



ment to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law.

1887 R. S. Sec. 2937; 1875 Compiled Laws, p. 604, Sec. 50.

## CHAPTER XCIX.

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**Section 2419. Proof or Acknowledgment before Justice or Clerk of Supreme Court:** The proof or acknowledgment of an instrument may be made at any place within this State before a justice or clerk of the supreme court.

1887 R. S. Sec. 2950.

**Section 2420. Proof or Acknowledgment Before Other Officers:** The proof or acknowledgment of an instrument may be made in this State within the city, county or district for which the officer was elected or appointed, before either:

1. A judge or clerk of a court of record; or,
2. A county recorder; or,
3. A notary public; or,
4. A justice of the peace.

1887 R. S. Sec. 2951; 1875, Compiled Laws, p. 597, Subdivision 1, Sec. 5.

**NOTARIES PUBLIC:** A grantee can not, as a notary public, take his grantor's acknowledgment.—Greenlee v. Smith (Kan.), 46 Pac. 543; Lee v. Murphy (Cal.), 51 Pac. 549, and where there are several grantees named in a deed, each receiving a separate and defined interest, and the grantor's acknowledgment is taken by one of them, the deed must be treated as if exe-

cuted to each of such grantees separately and is good as to each of them except the one taking the acknowledgment.—Murray v. Tulare Irr. Co. (Cal.), 49 Pac. 563. But an acknowledgment of a deed may be taken by a notary who is a nephew and attorney of a person interested in its procurement, especially where such interest merely consists in being president of a bank, the real party in interest and surety on the official bond against loss as to

which the bank has agreed to indemnify him.—*First N. Bank v. Roberts* (Mont.), 23 Pac. 718. Moreover an attorney who is a notary public is not disqualified from taking an acknowledgment of a mortgage, if it does not appear that he had any beneficial interest in having the mortgage made, or that his compensation in any manner depended upon the making of the mortgage. The mere facts that the mortgage was made to his client and that he holds a claim for collection which is secured by the mortgage make no difference.—*Havemeyer v. Dahn*, 48 Neb. 536, 67 N. W. 489. A notary who is the trustee in a deed of trust can not take an acknowledgment thereto.—*Rothschild v. Dougher*, 85 Tex. 332, 20 S. W. 142, so an acknowledgment of a deed of trust taken by the cestui que trust is void.—*Groesbeck v. Seeley*, 13 Mich. 329, but the fact that the deed of trust to a corporation was taken by a stockholder and director who was a notary public does not make the instrument

invalid in the absence of any improper conduct, bad faith or undue advantage arising out of his relation to the corporation.—*Cooper v. Hamilton Perpetual B. & L. Assn.* 97 Tenn. 285, 33 L. R. A. 338, 37 S. W. 12. Likewise, in respect to a mortgage where such notary was merely secretary and treasurer of the mortgagee corporation, where it does not appear that he was a stockholder or otherwise beneficially interested in having the mortgage made.—*Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485, 489.

**CLERK OF A COURT OF RECORD:** Clerks of probate courts have power to take acknowledgments of deeds because they are clerks of courts of record.—*James v. Fisk*, 47 Am. Dec. 111.

**JUSTICES OF THE PEACE:** A justice of the peace cannot do an official act or exercise a judicial function outside of his district and therefore an acknowledgment taken in one county before a justice of the peace of another county, where the land lies is void.—*Share v. Anderson*, 10 Am. Dec. 421.

**Section 2421. Proof or Acknowledgment Without the State:** The proof or acknowledgment of an instrument may be made without this State, but within the United States, and within the jurisdiction of the officer, before either :

1. A justice, judge or clerk of any court of record of the United States; or,
2. A justice, judge or clerk of any court of record of any state or territory; or,
3. A commissioner appointed by the governor of this State, for that purpose; or,
4. A notary public; or,
5. Any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take such proof or acknowledgment.

1887 R. S. Sec. 2952; 1875 Compiled Laws, p. 597, Subdivision 2, Sec. 5.

**COMMISSIONERS OF DEEDS:** Where the acknowledgment is taken without the state by a commissioner of deeds appointed by the governor of such state, no proof of authority other

than authentication by the seal of the officer is required.—*Smith v. Van Gilder*, 26 Ark. 527. Such a commissioner cannot take acknowledgments out of the state for which he was appointed.—*Jackson v. Colden*, 4 Cow. 266.

**Section 2422. Proof or Acknowledgment in Foreign Countries:** The proof or acknowledgment of an instrument may be made without the United States, before either :

1. A minister, commissioner or charge d'affairs of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
2. A consul or vice-consul of the United States, resident in the country where the proof or acknowledgment is made; or,
3. A judge of a court of record of the county where the proof or acknowledgment is made; or,



- 4. Commissioners appointed for such purposes by the governor of the State pursuant to statute; or,
- 5. A notary public.

1887 R. S. Sec. 2953; 1875 Comp. Laws, p. 597, part of third subdiv. Sec. 5.

**OFFICER UNKNOWN TO LAW:** Where an acknowledgment is taken in a foreign country by an officer whose office is unknown to the law of the state where the land lies, the authority to take it must be shown to give validity.—*De Segond v. Culver*, 10 Ohio 188.

**Section 2423. Proof or Acknowledgment by Deputy**  
When any of the officers mentioned in the four preceding Sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

1887 R. S. Sec. 2954.

**Section 2424. Person Taking Acknowledgment Must Identify the Person Executing Instrument:** The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in, and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation.

1887 R. S. Sec. 2953; 1875 Comp. Laws, p. 597, part of third subdiv. Sec. 5.

**IDENTIFICATION:** Where a married woman is introduced in her own house by her husband to a notary, the husband and notary being well acquainted, it is not necessary in order to prove the validity of the acknowledgment by the wife that her identity must be proven by the oath of some person, as required by the statute covering acknowledgments.—*Nippel v. Hammond*, 4 Colo. 211.

**Section 2425. Acknowledgment of Married Woman, How Taken:** The acknowledgment of a married woman to an instrument purporting to be executed by her, must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified, unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

1887 R. S. Sec. 2956; 1875 Comp. Laws, p. 600, Sec. 22.

Form of certificate: See Sec. 2429.

**SUBSTANTIAL COMPLIANCE:** A substantial compliance with the statute in the certificate of acknowledgment by a married woman is sufficient.—*Northwestern and Pac. Hypotheek Bank v. Rauch* (Idaho), 51 Pac. 764; *Christensen v. Hollingsworth* (Idaho), 53 Pac. 211; *Curtis v. Bunnell & Eno Inv. Co.* (Idaho), 55 Pac. 659. But if a certificate does not show that the examination and acknowledgment of the wife were made and taken apart from her husband, there was not such a substantial compliance.—*Co-operative S. & L. Ass'n. v. Green* (Idaho), 51 Pac. 770. So, also, there is no substantial compliance where the woman did not appear before the notary who signed the certificate.—*Wilson v. Wilson* (Idaho), 57 Pac. 708.

**PRESENCE OF HUSBAND:** Under this section, a certificate of acknowledgment of a mortgage reciting that "She was by me first made acquainted with the contents of the instrument, and thereafter she duly acknowledged to me, upon examination separately and apart from and without the hearing of her husband, that she executed the same." etc. is sufficient, and the mortgage is as to her void.—*Bollinger v. Manning* (Cal.), 21 Pac. 374. Likewise, where the certificate states that "she was by me first made acquainted with the contents thereof, and there-

upon acknowledged to me, on examination, separate and apart from and without the hearing of her husband, that she executed" etc. is defective in not showing that she was made acquainted with the contents without the hearing of her husband.—*Beck v. Soward* (Cal.), 18 Pac. 650.

**PRESUMPTION OF COERCION:** Unless a married woman acknowledges her deed in the manner prescribed by statute, the law presumes that she acted under the coercion of her husband.—*Hepburn v. Dubois*, 37 U. S. 345. If acknowledgment is defective rendering the deed void, she may after her husband's death, ratify it, and parol evidence is admitted to show such ratification.—*Jourdan v. Jourdan*, 9 S. & R. 268. But where a married woman's acknowledgment of a deed is fatally defective, her subsequent proper acknowledgment after she has conveyed to another, will not validate the deed.—*Durfee v. Garvey* (Cal.), 4 Pac. 377.

**WIFE LIVING APART:** This section does not expect married women

living apart from their husbands, and a conveyance of such a woman of her separate estate without such acknowledgment is void, and this result is not affected by the section of the Code (See Section 2403 of this Code) which provides that the wife may convey her separate property without her husband's consent.—*Danglarde v. Elias* (Cal.), 22 Pac. 69; *Loupe v. Smith* (Cal.), 56 Pac. 254. But see Section 2404 of this Code which makes substantial provision in case of the husband's leaving the State.

**MORTGAGES AND DEEDS:** This section is held to apply as well to the mortgage of a wife's landed estate as to a deed.—*Tolman v. Smith* (Cal.), 16 Pac. 189.

**DOES NOT WISH TO RETRACT:** The statement that she does not wish to retract in a certificate of acknowledgment of a married woman is essential, and the omission of it is fatal.—*Landers v. Bolton*, 26 Cal. 408; *Belcher v. Weaver*, 46 Tex. 293.

**Section 2426. Certificate of Officer Taking:** An officer taking the acknowledgment of an instrument must endorse thereon a certificate substantially in the forms hereinafter described.

1887 R. S. Sec. 2957.

**PROOF OF OFFICIAL CHARACTER:** The proof of the official character of an officer taking an acknowledgment is not necessary in order to give it validity in the absence of any statute requiring such proof if the certificate purports to have been made by an officer authorized by law to take acknowledgments and is in due form, but the certificate itself is prima facie evidence of that fact.—3 Wash. Real Prop. 3d Ed. 291.

**POWER OF OFFICER:** The power of an officer authorized to take acknowledgments to conveyances of property ceases when he has delivered his

certificate of acknowledgment to the parties and it has been accepted for recording. He can not afterward correct errors in his certificate or make a new one without a re-acknowledgment of the instrument.—*Griffith v. Ventress* (Ala.), 11 L. R. A. 193; 8 So. 312, but see *Jordan v. Corey* (Ind.), 52 Am. Dec. 516, contra.

**SUBSTANTIAL COMPLIANCE:** It is the established policy of the law to uphold certificates of acknowledgments of deeds, and wherever substance is found, obvious clerical errors and all technical omissions will be disregarded.—*Sumner v. Mitchell*, 29 Fla. 179, 14 L. R. A. 815, 10 So. 562.

**Section 2427. Form of Certificate; Generally:** The certificate of acknowledgment, unless it is otherwise in this Chapter provided, must be substantially in the following form:

State of Idaho, )  
County of \_\_\_\_\_ ) ss.

On this \_\_\_\_\_ day of \_\_\_\_\_, in the year of \_\_\_\_\_, before me (here insert the name and quality of the officer, personally appeared \_\_\_\_\_ known to me (or proved to me on the oath of \_\_\_\_\_), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same.

1887 R. S. Sec. 2958; 1875 Comp. Laws, p. 598, Sec. 9.

**BLANKS:** A blank in the place of the name of the grantor in a certificate of acknowledgment, stating that.....

personally came before the notary, and was personally known to be the identical person whose name was affixed to the instrument, is not a fatal defect.—*Milner v. Nelson* (Iowa), 19 L. R. A.



279, 53 N. W. 405. Obvious clerical errors will be disregarded and the instrument acknowledged may be resorted to for support to the acknowledgment.—*Sumner v. Mitchell* (Fla.), 14 L. R. A. 815, 10 So. 562; *Wilcoxon v. Osborn*, 77 Mo. 621; *Magness v. Arnold*, 31 Ark. 103. But a certificate to a deed, "Personally appeared..... and acknowledged the instrument....." is invalid because its purport does not show that the person who executed the deed also acknowledged it.—*Hayden v. Westcott*, 11 Conn. 129. Omission of the name of the county in the caption held to be merely informal.—*Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 149. Similarly, the name of the state was supplied by reference to the deed in which the grantor subscribed himself "resident of Suffield in the County of Hartford, State of Connecticut," and was held sufficient.—*Brooks v. Chaplin*, 2 Vt. 281.

**VARIANCE IN INSTRUMENT AND CERTIFICATE:** Where the deed purports to be signed by Geo. H. Case, and in the acknowledgment, the notary certifies that Geo. H. Crane was known to him to be the signer and sealer of such deed, the instrument is not competent without further proof as a conveyance by Geo. H. Case.—*Heil v. Redden* (Kan.), 16 Pac. 743.

**NAME AND TITLE OF OFFICER.** Where the title of an officer taking an acknowledgment of a deed is written

out in full, in the body of the certificate, its omission from the signature is immaterial and affixing it to the signature is sufficient. Initials may be used to designate the title.—*Sumner v. Mitchell*, 29 Fla. 179, 14 L. R. A. 815, 10 So. 562. See also Sec. 2431 and note. The omission from a certificate of acknowledgment of a tax deed of the words, "in and for said county" following the name and title of the justice of the peace who took the acknowledgment, will not render the deed invalid, when the caption or venue gives the name of the county and of the State.—*Douglas v. Bishop*, 45 Kan. 200, 25 Pac. 628, so the omission of the words, "notary public," in the signature to a certificate of acknowledgment, the body of which shows he was acting officially as a notary public, does not make the certificate invalid.—*L. E. & W. R. Co. v. Whitham*, 155 Ill. 514, 40 N. E. 1014.

**DATE:** The date is not material and its omission does not vitiate the instrument even where the statutory form calls for the date.—*Hobson v. Kissam*, 8 Ala. 357, for it may be taken at any time before filing for record or offering as evidence or filing for record.—*Johnson v. McGehee*, 1 Ala. 186; *Harrington v. Gage*, 6 Vt. 532. Even a date prior to that of the deed is not a substantial defect, but the true date may be shown.—*Gest v. Flock*, 2 N. J. Eq. 108.

### **Section 2428. Form of Certificate, Corporation:**

The certificate of acknowledgment of an instrument executed by a corporation, must be substantially in the following form:

State of Idaho,                    }  
County of—————} ss.

On this——day of——, in the year——, before me (here insert the name and quality of the officer), personally appeared——, known to me (or proved to me on the oath of——) to be the president (or the secretary) of the corporation that executed the instrument and acknowledged to me that such corporation executed the same.

1887 R. S. Sec. 2959.

### **Section 2429. Form of Certificate, Married Woman:**

The certificate of acknowledgment by a married woman must be substantially in the following form:

State of Idaho,                    }  
County of—————} ss.

On this——day of——, in the year of——, before me (here insert the name and quality of the officer), personally appeared——, known to me (or proved to me on the oath or——) to be the person whose name is subscribed to the within instrument, described as a married woman; and upon an examination without the

hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution.

1887 R. S. Sec. 2960.

Acknowledgment of married woman, when taken: Sec. 2425, and note.

**SUBSTANTIAL COMPLIANCE:** A substantial compliance with the statute is all that is necessary.—*Northwestern & Pacific Hypotheek Bank v. Rauch* (Idaho), 51 Pac. 764; *Christensen v. Hollingsworth* (Idaho), 53 Pac. 211; *Curtis v. Bunnell & Eno Investment Co.* (Idaho), 55 Pac. 659.

**CORRECT IN FORM:** Where the certificate of acknowledgment of a married woman is valid on its face, and is attacked on the ground that it is false, the validity of the certificate will be sustained unless the proof of the

falsity is clear and convincing and establishes the fact beyond a reasonable doubt.—*Gray v. Law* (Idaho), 57 Pac. 435.

**MATTER INCLUDED BY REFERENCE:** A deed is duly acknowledged by a married woman when the notary certifies in accordance with this section that "he has made her acquainted with the contents of the instrument," though the deed shows that it is subject to conditions contained in another instrument not signed by her and not then executed, whose contents were unknown to the notary.—*Bull v. Coe* (Cal.), 18 Pac. 808.

### **Section 2430. Form of Certificate, Attorney in Fact:**

The certificate of acknowledgment by an attorney in fact, must be substantially in the following form:

County of \_\_\_\_\_ }  
State of Idaho. } ss.

On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me, (here insert the name and quality of the officer) personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the person whose name is subscribed to the within instrument as the attorney in fact of \_\_\_\_\_, and acknowledged to me that he subscribed the name of \_\_\_\_\_ thereto as principal, and his own name as attorney in fact.

1887 R. S. Sec. 2961.

**Section 2431. Certificate, How Authenticated:** Officers taking and certifying acknowledgments or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also their seals of office, if by the laws of the territory, state, or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.

1887 R. S. Sec. 2962: Comp. Laws, p. 597, Sec. 6.

**SIGNATURE AND SEAL:** A notary public of C. county took an acknowledgment of a deed there. His certificate was headed "State of California, City and County of S. On this day ..... before me, H. I. Tillotson, a notary in and for said city and county," etc., and signed "H. I. Tillotson, Notary Public." The certificate stated that he had "affixed his official seal" which contained the words "Notary of C. County." He was not a notary of S. county. Held, that the acknowledgment was fatally defective, under the Civil Code of California, Sections 1188, 1189, requiring the name and quality of

the officer taking acknowledgments to be in the certificates, and Section 1193 requiring them to authenticate their certificates by affixing their signatures followed by their names and seals of office. Beatty, C. J. dissenting.—*Emmeric v. Alvarado* (Cal.), 27 Pac. 357. The three sections cited in this case are identical with Sections 2426, 2427, 2431, respectively, of this Code. (Note by Code Com.) Where there are separate acknowledgments by a husband and wife on a deed, one immediately under the other, each having a separate caption, but the bottom one only is signed, it is sufficient.—*Wright v. Wilson*, 17 Mich. 192. Where a notary is required to use a seal, his official seal is meant



and he cannot use a private seal even though he has not yet provided himself with an official seal, unless there is some statute allowing it.—*Mason v. Brock*, 12 Ill. 273. Where the acknowledgment is taken without the state by a commissioner of deeds appointed by the governor of such state, no proof of authority other than an authentication

by the seal of the office is required.—*Smith v. Van Gilder*, 26 Ark. 527. A certificate of acknowledgment of a deed in which the person taking the acknowledgment gives himself no official designation or title is insufficient and the record of the deed is invalid.—*Johnson v. Haines*, 15 Am. Dec. 533.

**Section 2432. Certificate of Authority of Justice of the Peace:** The certificate or proof of acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the recorder of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the recorder is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

1887 R. S. Sec. 2963.

**Section 2433. Proof of Execution, by Whom Made:** Proof of the execution of an instrument, when not acknowledged, may be made either.

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses in the cases hereinafter mentioned.

1887 R. S. Sec. 2964; 1875 Comp. Laws, p. 598, Secs. 12, 13.

**Section 2434. When Made by Subscribing Witness:** If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such, by the oath of a creditable witness.

1887 R. S. Sec. 2965; 1875 Comp. Laws, p. 598, Sec. 12.

**Section 2435. What Subscribing Witness Must Prove:** The subscribing witness must prove that the person whose name is subscribed to the instrument as a party, is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

1887 R. S. Sec. 2966; 1875 Comp. Laws, p. 598, Sec. 13.

**Section 2436. When Execution May be Proved by Handwriting:** The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are non-residents of the State; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself or cannot be

found by the officer, by the exercise of due diligence, in attempting to serve the subpoena or attachment; or,

5. In case of the continued failure or refusal of the witness to testify for the space of one hour, after his appearance.

1887 R. S. Sec. 2967; 1875 Comp. Laws, p. 599, part of Sec. 15.

**Section 2437. What the Evidence Must Prove:** The evidence taken under the preceding Section, must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,

3. That the witness testifying, personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,

4. The place of residence of the witness.

1887 R. S. Sec. 2968; 1875 Comp. Laws, p. 598, Sec. 16.

**Section 2438. Certificate of Proof; What Must Contain:** An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.

1887 R. S. Sec. 2969; 1875 Comp. Laws, p. 598, Sec. 14.

**SURPLUSAGE WILL NOT VITIATE:** Where to the certificate of proof by a subscribing witness of the execution of a deed, the witness adds his

signature and the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if without them it shows a substantial compliance with the requirements of the statute.—*Whitney v. Arnold*, 10 Cal. 531.

**Section 2439. Authority of Officers in Taking Proof:** Officers authorized to take the proof of instruments, are authorized in such proceedings:

1. To administer oaths or affirmation, as prescribed in the Code of Civil Procedure;

2. To employ and swear interpreters;

3. To issue subpoena, as prescribed in the Code of Civil Procedure;

4. To punish for contempt as prescribed in the Code of Civil Procedure;

The civil damages and forfeiture to the party aggrieved are prescribed in the Code of Civil Procedure for a witness disobeying a subpoena.

1887 R. S. Sec. 2970; 1875 Comp. Laws, p. 599, part of Sec. 18.

**Section 2440. Action May be Had to Correct Certificate:** When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate.



1887 R. S. Sec. 2971.

**APPLICATION OF THE SECTION:**

This section refers to and was intended to refer and apply to all defective certificates of acknowledgment, whether made by single or married persons.—Bunnell & Eno Inv. Co. (Idaho), 51 Pac. 767.

**IMPEACHMENT:** A notary's certificate of acknowledgment can not be impeached by his own evidence.—Shapleigh v. Hull, 21 Colo. 419, 41 Pac.

1108, but the case of Heaton v. Norton Co. State Bank (Kan.), 47 Pac. 576, holds that an officer certifying the grantor's acknowledgment is competent to testify as to the circumstances thereof, though the testimony may show that the execution of the deed was obtained by duress or undue influence.

This section cited in Burbank v. Kirby (Idaho), 55 Pac. 295.

**Section 2441. Action to Obtain Judgment Proving Instrument:** Any person interested under an instrument entitled to be proved for record, may institute an action in the district court against the proper parties to obtain a judgment proving such instrument.

1887 R. S. Sec. 2972.

**Section 2442. Certified Copy of Judgment Entitles Instrument to Record:** A certified copy of the judgment in a proceeding instituted under either of the two preceding Sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged.

1887 R. S. Sec. 2973.

**Section 2443. Conveyances Governed by Laws in Force When Act was Performed:** The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this Code goes into effect, executed, acknowledged, proved, or recorded, is not affected by anything contained in this Chapter, but depends for its validity and legality upon the laws in force when the act was performed.

1887 R. S. Sec. 2974.

**Section 2444. Record of Instrument Made Prior to Code:** All conveyances of real property made before this Code goes into effect, and acknowledged or proved, according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded in the same manner and with like effect, as conveyances executed and acknowledged in pursuance of this Chapter.

1887 R. S. Sec. 2975; 1875 Comp. Laws, p. 605, Sec. 52.

**Section 2445. Instrument Recorded Prior to June 1st, 1887:** Any instrument affecting real property, which previous to June 1st, 1887, was copied into the proper book of record, kept in the office of any county recorder imparts notice of its contents to subsequent purchasers and incumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate but nothing herein affects the rights of previous purchasers or incumbrancers. Duly certified copies of the record of any such instrument may be read in evidence with like effect, as copies of

an instrument duly acknowledged and recorded, provided it be first shown that the original instrument was genuine.

1887 R. S. Sec. 2976.

## CHAPTER C.

### RECORDING TRANSFERS.

#### Section.

- 2446. What may be recorded.
- 2447. Judgments, may be recorded when.
- 2448. Letters patent from United States may be recorded.
- 2449. Notices of location may be recorded.
- 2450. Requisites to entitle to record.
- 2451. Instrument executed by attorney in fact, when recorded.
- 2452. Amount of fees endorsed on instrument.

#### Section.

- 2453. Instruments, where recorded.
- 2454. When instrument deemed to be recorded.
- 2455. Separate books of record.
- 2456. Record is constructive notice to whom.
- 2457. When conveyance void against subsequent purchaser.
- 2458. "Conveyance," what embraces.
- 2459. Power of attorney, how revoked.
- 2460. Validity of unrecorded instrument.

**Section 2446. What May be Recorded:** Any instrument or judgment affecting the title to or possession of real property may be recorded under this Chapter.

1887 R. S. Sec. 2990.

**Section 2447. Judgments May be Recorded, When** Judgments affecting the title to or possession of real property, authenticated by the certificate of the clerk of the court in which such judgments were rendered, may be recorded without acknowledgment or further proof.

1887 R. S. Sec. 2991.

**Section 2448. Letters Patent from United States May be Recorded:** Letters patent from the United States executed and authenticated pursuant to existing law, may be recorded without further proof.

1887 R. S. Sec. 2992.

**Section 2449. Notices of Location May be Recorded:** Certificates and notices of location authorized by law with the affidavits attached may be recorded without acknowledgment or further proof.

1887 R. S. Sec. 2993.

**Section 2450. Requisites to Entitle to Record:** Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof certified in the manner prescribed by Chapter XCIX of this Title.

1887 R. S. Sec. 2994.

**VOID ACKNOWLEDGMENT:** The record of a mortgage the acknowledg-

ment of which is void, imparts no notice to third parties.—*Lee v. Murphy* (Cal.), 51 Pac. 549.

**Section 2451. Instrument Executed by Attorney in Fact, When Recorded:** An instrument executed by an attorney



in fact must not be recorded until the power of attorney authorizing the execution of the instrument is filed for record in the same office.

1887 R. S. Sec. 2995.

**AS BETWEEN THE PARTIES:** The acknowledgment and recording of a power of attorney is no part thereof and as between the parties thereto,

such instruments are good without acknowledgment or record. These requirements are for the benefit of third parties.—*McAdow v. Black* (Mont.), 1 Pac. 751.

**Section 2452. Amount of Fees Endorsed on Instrument:** The recorder must in all cases endorse the amount of his fee on the instrument recorded, and on the record thereof.

1887 R. S. Sec. 2996.

**WHAT FEE PAYS FOR:** The fee fixed by statute for recording a paper covers every act necessary to be done

in order to complete a legal filing thereof.—*Demers v. Board of Commissioners* (Kan.), 47 Pac. 567.

**Section 2453. Instruments, Where Recorded:** Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated.

1887 R. S. Sec. 2997.

**DELIVERY ELSEWHERE:** The delivery for filing of an instrument at a place other than the office where it is

to be filed, to the proper officer, is insufficient, although the officer indorsed it as filed.—*Edwards v. Grand* (Cal.), 53 Pac. 796.

**Section 2454. When Instrument Deemed to be Recorded:** An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office with the proper officer for record.

1887 R. S. Sec. 2998.

**TIME OF CONSTRUCTIVE NOTICE:** The Civil Code of California, Sec. 1170 (this section) must be read in connection with Section 1213 (2456 this Code) which requires the instrument to be recorded as prescribed by law before subsequent purchasers are charged with constructive notice of its contents; and hence no notice is imparted until the instrument is actually placed on record in its proper book, and then it relates back to the date of deposit for record.—*Watkins v. Wilhoit* (Cal.), 35 Pac. 646. But if a

mortgage entitled to record is left with the proper officer for that purpose and not withdrawn until the mortgagee in good faith believes it to be recorded, his title will be protected against a subsequent purchaser, although it is not in fact placed on the records. The remedy of the party aggrieved is against the officer.—*Chandler v. Scott*, 127 Ind. 226, 26 N. E. 797; and it was similarly held where the record of conveyance was placed in the wrong book.—*Watkins v. Wilhoit* (Cal.), 35 Pac. 646.

**Section 2455. Separate Books of Record:** Grants and conveyances absolute in terms, are to be recorded in one set of books, and mortgages in another.

1887 R. S. Sec. 2999.

**RECORD CONCLUSIVE AS TO BONA FIDE PURCHASER:** A bona fide purchaser of land from one who holds the record title without notice that it is partnership property, obtains a good title.—*Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078; but a recorded deed made by one who has then no title to the land is not within the chain of title so as to be constructive notice to a subsequent purchaser to whom the same grantor conveys after obtaining title by a recorded deed.—*Ford v. Unity Church Society*, 120 Mo.

498, 25 S. W. 394. The Civil Code of California, Section 1170 (Section 2454, this Code) must be read in connection with Section 1213 (this section) which requires the instrument to be "recorded as prescribed by law" before subsequent purchasers are charged with constructive notice of its contents; and hence no notice is imparted until the instrument is actually placed on record in its proper book and then it relates back to the date of deposit for record.—*Watkins v. Wilhoit* (Cal.), 35 Pac. 646.

**VOID ACKNOWLEDGMENT:** The record of a mortgage the acknowledgment of which is void, imparts no notice to third parties.—*Lee v. Murphy*, (Cal.), 51 Pac. 549.

**CONDITION SUBSEQUENT:** Succeeding purchasers of land take with notice of and subject to a condition subsequent in a conveyance which is recorded.—*Sioux City & St. P. R. Co.*

*v. Singer*, 49 Minn. 301, 15 L. R. A. 751, 51 N. W. 905.

**PRIOR MORTGAGEES:** A subsequent grantor or incumbrancer, in order to protect his equities, must bring home actual notice to the prior mortgagee, who is not affected by the record of the subsequent mortgagee or incumbrancer.—*Boone v. Clarke*, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850.

**Section 2456. Record is Constructive Notice to Whom:** Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

1887 R. S. Sec. 3000; 1875 Comp. Law s, p. 601, Sec. 25.

**Section 2457. When Conveyance Void Against Subsequent Purchaser:** Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

1887 R. S. Sec. 3001; 1875 Comp. Laws, p. 601, Sec. 26.

**WHAT IS A SUBSEQUENT PURCHASER:** Where cestui que trust brings an action to compel his trustee to reconvey to him the trust property after the trustee has conveyed to the bona fide purchaser and the clerk executes a conveyance to the plaintiff therein pursuant to the decree, such a cestui que trust is not a subsequent purchaser within the meaning of this section providing that every conveyance of real property is void as against any subsequent purchaser in good faith whose conveyance is first recorded.—*Warnock v. Harlow*, 96 Cal. 298, 31 Pac. 166. But a judgment creditor who purchases land under his own judgment, and merely credits the net proceeds on such judgment is a purchaser in good faith and for a valuable consideration within the meaning of this section.—*Foorman v. Wallace* (Cal.), 17 Pac. 680; *McMurtie v. Riddell* (Colo.), 13 Pac. 181.

**WHAT CONVEYANCE IS VOID:** Where a plaintiff's grantor and the defendant held from the same grantor, and the deed of the plaintiff's grantor was recorded before the defendant's deed was recorded, the plaintiff's title can not be affected by the fact that the defendant's deed was put on record be-

fore the plaintiff purchased.—*Tabor v. Sullivan* (Colo.), 20 Pac. 437. A deed in consideration of a pre-existing deed is a conveyance for value, under this section.—*Gassen v. Hendrick* (Cal.), 16 Pac. 242. Where a deed is deposited in escrow to be delivered to the grantee in case the grantors do not sell and pay off the indebtedness within the agreed time, and they make a sale but do not make the payment within the time, the purchaser with notice of the escrow obtains no right under the second deed made by the grantors.—*Conneau v. Geis* (Cal.), 14 Pac. 580. An assignment by the obligee of a bond for the conveyance of realty held to be within a similar provision.—*McFarren v. Knox*, 5 Colo. 217. A duly recorded deed is notice of the title of the owner, to a person who buys timber on the land from another person.—*Alliance Trust Co. v. Nettleton Hardwood Co.* 74 Miss. 584, 36 L. R. A. 155, 21 So. 396.

**WHO ENTITLED TO BENEFIT OF RECORD:** A purchaser of land is entitled to the benefit of the record of the release of a mortgage thereon, though he relied on a statement that the land was unencumbered, and did not examine the record and the release was made by mistake.—*Miller v. Hicken* (Cal.), 28 Pac. 339.

**Section 2458. "Conveyance," What Embraces:** The term "conveyance" as used in this Chapter, embraces every instrument in writing by which any estate or interest in real property is



created, alienated, mortgaged or incumbered, or by which the title to any real property may be affected, except wills.

1887 R. S. Sec. 3002; 1875 Comp. Laws, p. 602, Sec. 36.

### **Section 2459. Power of Attorney, How Revoked:**

No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked, by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.

1887 R. S. Sec. 3003; 1875 Comp. Laws, p. 601, Sec. 28.

**REVOCATION BY DEATH:** The power of attorney to convey becomes extinct by the death of the grantor,

though the power be irrevocable and no title passes by a deed subsequently made by an attorney.—*Frink v. Roe* (Cal.), 7 Pac. 481.

### **Section 2460. Validity of Unrecorded Instrument:**

An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.

1887 R. S. Sec. 3004.

**ADVERSE POSSESSION WITHOUT COLOR OF TITLE:** A party claiming land only by adverse possession and operation of the statute of limitations, has no right under the statute enacting that no deed shall be valid except as to the parties interested, and those who have actual notice of the same until recorded, to dispute the title of the holder of an unrecorded deed.—*Armijo v. Armijo*, 13 Pac. 92.

#### **RELEASE OF EASEMENTS:**

Where a sealed instrument releasing an easement is followed by acts denoting an unequivocal intention to abandon the easement, failure to record it is of no importance, even as against subsequent purchasers, as the instrument is of importance only as showing with the other facts an intention to abandon the easement.—*Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414, 18 N. E. 370.

## **CHAPTER CI.**

### **UNLAWFUL TRANSFERS.**

#### **Section.**

- 2461. What instruments void as against purchasers.
- 2462. Not void against purchaser, when.
- 2463. Power to revoke, what operates as revocation.
- 2464. When power of revocation is deemed executed.
- 2465. Transfers of personal property in trust, void when.

#### **Section.**

- 2466. Transfers with intent to defraud, void against whom.
- 2467. Transfer of personal property without delivery conclusively presumed fraudulent.
- 2468. Fraud a question of fact.
- 2469. Effect of this chapter on purchaser.

### **Section 2461. What Instruments Void as Against**

**Purchasers:** Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior to subsequent purchasers thereof, or incumbrancers thereon, is void as against every purchaser or incumbrancer, for value of the same property, or the rents or profits thereof.

1887 R. S. Sec. 3015; 1875 Comp. Laws, p. 606, Sec. 1.

Voluntary conveyances and their ef-

fect as to creditors.—See extensive notes, 14 Am. Dec. 703; 28 Am. Rep. 721; 4 L. R. A. 353; 9 Id. 413.

**Section 2462. Not Void Against Purchaser, When:**

No instrument is to be avoided under the last section, in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

1887 R. S. Sec. 3016; 1875 Comp. Laws, p. 607, Sec. 2.

**NOTICE:** Where a mortgage was executed for the purpose of defrauding the mortgagor's creditors and was taken by a mortgagee with notice of that purpose, and to aid its execution, it is void as to those creditors, even though it be founded on a perfect consideration. And where a mortgage is made with intent to defraud creditors, and the circumstances are such as to awaken a suspicion of the mortgagee and to put him upon inquiry as to the intent with which the mortgage is made, he will be charged with notice of that intent.—*Moore v. Williamson* (N. J.), 1 L. R. A. 336, 15 Atl. 587. But a mere suspicion without any well founded ground for belief is not notice of fraud, nor is it cause for disturbing

or invalidating the transactions of life.—*Tuteur v. Chase* (Miss.), 4 L. R. A. 832, 6 So. 241.

In a proceeding by creditors to set aside a sale of their debtor made for the purpose of defrauding them, taken under the statute providing that the conveyance intended to defraud creditors is void, as to them, but that the title of a purchaser if valid, shall not be affected by such enactment unless it appears that he had notice of the fraud. The creditor to defeat the sale must show the fraudulent intention. When this is done, the purchaser to sustain the transaction, must show that he paid value, after which the creditor to prevail, must prove that the purchaser had notice of the fraud.—*Tillman v. Heller* (Tex.), 11 L. R. A. 628, 14 S. W. 700.

**Section 2463. Power to Revoke; What Operates as Revocation:**

Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estates, by the person having the power of revocation, in favor of a purchaser or incumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or incumbrancer.

1887 R. S. Sec. 3017; 1875 Comp. Laws, p. 607, Sec. 3.

**TRUST DEEDS:** A voluntary deed of trust passing a present interest in fee to the trustee, with full power to control, encumber, and sell the property, without reserving a power of revocation, is irrevocable, and a want of consideration therefor is immaterial.—*Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301, but if a trust deed contains a power of revocation, the grantor may exercise the power, and this, by mortgage on the trust property, executed in terms without reference to the power.—*Gaither v. Williams*, 57 Md. 625. Likewise, after a trust has been created and accepted, the trustor has no power to revoke it without the consent of the beneficiaries, unless such power was reserved in the declaration of the trust.—*Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659. And where deeds absolute in form were given to a bank as security for indebtedness, and the bank executed a declaration of trust, declaring that the lands conveyed were held

as security, and the debtor, finally, being overwhelmed with debt, and unable to meet his liabilities to the bank, proposed to convey the lands to the bank in fee-simple absolute, in discharge and satisfaction of the indebtedness, and a final settlement was thereupon made, and new conveyances, absolute in form executed to and accepted by the bank, which surrendered the evidences of indebtedness to the debtor no oppression or unfairness appearing on the part of the bank, and the settlement being fair and for a full consideration, the express trust was thereby terminated, and any action to enforce an implied trust was barred in four years after the settlement and delivery of the deeds and notes.—*Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896.

Similarly, where a mother held judgments amounting to \$20,000 against her son, and assigned part of them in trust for certain objects, the balance on such trusts as the son might appoint, then in trust to pay the interest to him,



free from liens of any of his present creditors. The trustor reserved the power to revoke the trust, and afterwards assigned the whole of the judg-

ments to the son. The judgments became the son's absolutely and the trust was thereby revoked.—*Carter v. Hough*, 86 Va. 668, 10 S. E. 1063.

**Section 2464. When Power of Revocation is Deemed Executed:** Where a person having a power of revocation within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the power is deemed to be executed as soon as he is entitled to execute it.

1887 R. S. Sec. 3018; 1875 Comp. Laws, p. 607, Sec. 4.

See notes under preceding section.

**Section 2465. Transfers of Personal Property in Trust, Void When:** All deeds of gift, all conveyances and all transfers or assignments verbal or written, of goods, chattels or things in action, made in trust, for the use of the person making the same, are void as against the creditors existing or subsequent of such person.

1887 R. S. Sec. 3019; 1875 Comp. Laws, p. 608, Sec. 11.

**APPLICABLE ONLY TO PERSONALTY:** This section has no application to sales of real estate.—*Brown v. Perrault* (Idaho), 51 Pac. 752. A sale and transfer of personal property to a creditor with a contemporaneous verbal agreement between grantor and

grantee that any excess derived from said property above what was necessary to pay the grantee what was due him should be returned to the grantor, is void as against creditors of the grantor, as a sale in trust for the benefit of the grantor.—*Johnson v. Sage* (Idaho), 44 Pac. 641.

**Section 2466. Transfer with Intent to Defraud, Void Against Whom:** Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

1887 R. S. Sec. 3020.

**TO DEFRAUD AND DELAY:** A sale of personal property with intent to delay or defraud creditors of grantor is void.—*Johnson v. Sage* (Idaho), 44 Pac. 641. A judgment debtor can not defeat his own fraudulent conveyance by purchasing through another the property conveyed under a subsequent judgment against himself.—*Eisner v. Heileman* (N. J.), 9 L. R. A. 96, 20 Atl. 46. Neither the Civil Code of California nor the statute of frauds prevents a debtor admittedly insolvent from transferring his property directly to his creditors, either absolutely in payment of his debt or as security by way of mortgage.—*Woods v. Franks*, 67 Cal. 32, 7 Pac. 50. Where facts are

established from which the jury would be justified in inferring fraud in the transfer of goods to the plaintiff, though the inference may be absolutely necessary, the defendant is entitled to have the issue of fraud submitted to the jury upon instructions wholly and fairly stating the law applicable to a fraudulent transfer.—*Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497. A sale of personal property in payment of an antecedent indebtedness is not void under this section, even though the vendee knew that the effect of the sale would be to hinder and delay other creditors of the vendor in the collection of their debts.—*Ross v. Sedgwick*, 69 Cal. 247, 10 Pac. 400.

**Section 2467. Transfer of Personal Property without Delivery Conclusively Presumed Fraudulent:** Every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage, when allowed by law, is con-

clusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer.

1887 R. S. Sec. 3021.

This section cited in *First National Bank of Hailey v. Van Ness* (Idaho), 43 Pac. 59; *Coombs v. Collins* (Idaho), 57 Pac. 310; *Cornwall v. Mix* (Idaho), 34 Pac. 893.

**KNOWLEDGE OF CREDITOR:** The fact that the attaching creditor knew of the pretended sale of G. to H. and continued to deal with G. as manager is of no moment and can not be urged to prevent the operation of the statute.—*Harkness v. Smith*, 2 Idaho, 952, 28 Pac. 423. Distinction is noted in this case between cases under this and the previous section at page 956.

**NECESSITY FOR DELIVERY:** The defendant as sheriff levied upon the property by virtue of attachment at the suit of L. against K. in the year following the transfer of the property. Held, that the property was not subject to the levy for the debts of K. A creditor desiring to test the validity of the sale must prove a debt or judgment, if it has been reduced to a judgment, before he can be permitted to question the validity of the transfer of property or a pledge.—*Murphy v. Braase* (Idaho), 32 Pac. 208. A plaintiff cannot invoke the provisions of this section to defeat a defendant's title to property which he has purchased when the defendant has been prevented from retaining continuous possession of such property by the unlawful act of the plaintiff's vendor.—*Couch v. Montgomery* (Idaho), 59 Pac. 16. If a transfer of property was made by the deceased to the defendant for the purpose of defrauding the creditors of said deceased, his administratrix might maintain an action for the recovery of it, and in that aspect of the case, it will be material that there were creditors to be defrauded as well as that the transfer was made with intent to defraud them.—*Harris v. Harris*, 59 Cal. 623. If the property is so situated that a purchaser can take possession of it at pleasure, his failure to do so renders the previous transfer void as to the creditors of the vendor.—*Pearce v. Boggs*, 99 Cal. 340, 33 Pac. 906. Where one of two partners sells to a third

person his interest in a stock of goods belonging to the partnership, there must be an immediate delivery and a continued change of possession, as required by this section, or the sale will be void as to creditors, and it is immaterial that the business of the partnership is conducted under a fictitious name.—*Newell v. Desmond*, 63 Cal. 242. A transfer of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession is fraudulent and void as against the claim of any creditor who is such creditor during any of the time the person making the transfer remains in possession, and such creditor may cause the property to be seized in the same manner as he might have done had there been no attempted transfer by the debtor. The consideration paid by the purchaser or the good faith of the transaction can not be inquired into for the purpose of evading the force and effect of the law declaring such transfer fraudulent and void.—*Brown v. O'Neal*, 95 Cal. 262, 30 Pac. 538. The sale of personal property accompanied by immediate delivery and continued change of possession, as required by this section, is void as to creditors, notwithstanding the fact that the vendee obtains possession before the delivery is made by the creditor.—*Watson v. Rodgers*, 53 Cal. 401.

**WHAT CONSTITUTES DELIVERY:** The statute of frauds does not require personal property to be removed from the place where situated when sold. It does not in any sense refer to the place but to the actual and continued change of possession. It is neither important nor necessary that the goods should be or remain in the possession of the purchaser. It is only essential that they be not allowed to revert to or remain in possession of the vendor.—*Hazard v. Cole*, 1 Idaho, 276. M. loaned K. \$1500 in money and took a bill of sale of some thirteen head of horses and some other articles of personal property at the time the bill of sale was taken. K. called Nelson Brothers, who then had possession of



the property, and in the presence of M. told Nelson Brothers that he had transferred the property to M. for the purpose of securing the indebtedness above mentioned. He told Nelson Brothers to hold the property for M. The horses had then just been gathered from the range and were in the corral of Nelson Brothers in the town where the transaction took place, to be taken to the winter range and to be cared for during the winter by said Nelson Brothers. Nelson Brothers were also informed by K. that M. would pay for the wintering of the horses and that they were to be turned over to them in the spring. Two horses that were included in the bill of sale were in charge of one Lufkin. K. notified Lufkin that he had returned the horses over to M. and that he must deliver them to him. In the spring Nelson Brothers returned the horses from the winter range and delivered them to Murphy who hired a man to look after them on the range during the following summer. Held, that there was such delivery and continued change of possession as would relieve the property from the provisions of this section.—*Murphy v. Braase* (Idaho), 32 Pac. 208. G. being greatly indebted, sold a stock of merchandise to H., one of his principal creditors, and who held a chattel mortgage on the stock of merchandise owned by G. as security. Sale was made at the residence of H. 25 miles from the place where the merchandise was. No invoice was taken, no specification or examination of stock, no change in the clerical force, nor in the conduct nor management of business. G. continued to conduct the business as before, except that he added the abbreviation "Mgr." when signing letters, checks, etc. Held that there was no immediately delivery and actual and immediate change of possession as the statute requires, and the sale was void as to creditors.—*Harkness v. Smith*, 2 Idaho, 952, 28 Pac. 423. Where one sold a quantity of wheat to . and M. on September third, no delivery thereof having been made nor any change of possession, and on the 23d of the same month, the defendant levied an execution against L. upon said wheat, the sale to H. and M. was void as to creditors under this section.—*Hallett v. Parrish* (Idaho), 51 Pac. 109. Where the continuity of defendant's possession has been broken by the unlawful act of the plaintiff's vendor, the plaintiff cannot invoke the provisions of this section to defeat the defendant's title.—*Couch v. Montgomery* (Idaho), 59 Pac. 16. The acts required to prevent a sale of personal property from being declared fraudulent for

want of an immediate delivery and actual and continued change of possession, depend very much on the character and quality of the property sold.—*Lay v. Neville*, 25 Cal. 546. An instruction to the jury that "what constitutes a delivery of personal property by the vendor to the vendee depends upon the character of the property sold and the circumstances of each particular case, and for the purpose of delivery it is not necessary that the property should pass into the actual possession of the vendee; therefore, when it is so situated that the vendee is entitled to and can rightfully take possession thereof at his pleasure, he is considered as actually having received it as the statute requires," is as to the latter clause thereof, in direct conflict with this section.—*Pearce v. Boggs*, 99 Cal. 340, 33 Pac. 906. The word "actual" as applied to change of possession required by this section, means existing in the act, truly and absolutely so; where acted or acting; carried out; opposed to potential, possible, virtual or theoretical.—*Bunting v. Saltz*, 84 Cal. 168, 24 Pac. 167. All that the statute requires is that the delivery must be made. The vendee must take actual possession, the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee, the possession must continue—not taken to be surrendered back again—not formally, but substantially. But it need not necessarily continue indefinitely when it is bona fide and openly taken and is kept for such a length of time as to give general advertisement of the status of the property and the claim to it by the vendee.—*Stevens v. Irwin*, 15 Cal. 502. Instructions to the effect that if the property levied upon was not in existence at the time of the sale, then there could not have been a change of possession as to it, and the requirements of this section with reference to a change of possession would not apply and the sale would be valid, even as against creditors without reference to the question of change of possession, were held proper.—*Newell v. Desmond*, 74 Cal. 46, 15 Pac. 369. At the time of the sale the plaintiff, a lodger in the house immediately took possession of the furniture, and notified the inmates of the house that he had bought it and continued to exercise control over it until it was seized by the defendant. From the time of the sale until a few hours before the seizure the vendor of the plaintiff resided in the house, but during most of the time was ill in bed. Held, that the evidence was sufficient to show that the sale was accompanied

by an immediate delivery and followed by an actual and continued change of possession, and that the vendee might have taken actual possession of the furniture, although the legal possession of the house remained in the vendor.—*Ross v. Sedgwick*, 69 Cal. 247, 10 Pac. 400. His employment by the vendee of one of the vendors after the sale of personal property, while tending to show a want of actual and continued change of possession is not conclusive of the question, but only an element of proof to be weighed by the jury.—*Goldstein v. Nunan*, 66 Cal. 542, 6 Pac. 451. The employment of the vendor as a clerk or salesman is not absolutely incompatible with an absolute and continued change of possession, and is not of itself, regardless of all other facts and circumstances, conclusive evidence of fraud, and it is not per se fraud which admits of no explanation.—*Godchaux v. Mulford*, 26 Cal. 316. Growing crops not being capable of manual delivery, are not in the possession or under the control of the vendor within the statute, and the sale of growing wheat is valid where the purchaser took a bill of sale, and as soon as the grain was harvested, took possession and marked the sacks with his initials and continued to exercise such acts of ownership as are usual under the circumstances.—*O'Brien v. Ballou* (Cal.), 48 Pac. 130. Where a bill of sale is made under an oral agreement that it shall be delivered only upon the happening of a certain event, the sale being conditional is not fraudulent and void as to creditors because the seller retains possession of the property deliv-

ered until the condition transpires.—*Roberts v. Hawn* (Colo.), 36 Pac. 886. Fraud in a mortgage allowing the mortgagor to retain possession with "full use and enjoyment" of the goods until default, authorizes the court, without regard to extrinsic facts, to declare it void as to creditors of the mortgagor.—*Lutz v. Kinney* (Nev.), 50 Pac. 1031. Where a building which is personal property is assigned for the benefit of creditors a finding that immediate possession was delivered and taken by the assignee, as required by the statute, so as to prevent the assignment from being void as to other creditors, on evidence of conduct of the assignor's showing that by delivery of the deed of assignment, they intended to and did voluntarily give up possession to the assignee will not, in the absence of any evidence of fraud, be disturbed on the ground that it is not shown that the assignee never took actual physical occupation of the building.—*Tuttle v. Merchants' National Bank*, 47 Pac. 203. A sale by a landlord who was to receive a share of the hay raised by his tenant of a certain number of tons, with the consent of the tenant and while the hay remained in his possession undivided, he agreeing to retain possession for the purchaser, is not within the statute, the property never having been in possession of the vendor.—*Weiland v. Potter* (Colo.), 44 Pac. 769. A sale of horses by a man to his wife is void as to creditors under this section, where he managed them after the sale just the same as before, though he did so as the purchaser's agent.—*Murphy v. Mulgrew* (Cal.), 36 Pac. 857.

**Section 2468. Fraud a Question of Fact:** In all cases arising under the provisions of this title, except as otherwise provided in the last section, the question of fraudulent intent is one of fact, and not of law; nor can any transfer or change be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

1887 R. S. Sec. 3022.

**FRAUD, A MATTER OF RECORD:**

A misrepresentation by one party to another as to the time for redemption under a sale is not a fraud. The time at which the right to redeem expired was ascertainable in the office of the recorder of the county, and was equally within the reach and knowledge of both parties, and neither party had a right, or was in any manner justifiable in relying upon the recollection of the other.—*Hazard v. Cole et al.* 1 Idaho 276.

**CONSIDERATION:** A conveyance of land is not prima facie or presumptively fraudulent as against existing

creditors merely because it is not made for a valuable consideration.—*Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557. Members of a partnership largely indebted and insolvent may lawfully mortgage the firm property to secure an individual indebtedness, if in so doing they are acting in good faith, and no fraudulent intent will be presumed on the sole ground that the conveyance was not founded on a valuable consideration.—*Purple v. Farrington* (Ind.), 4 L. R. A. 535, 21 N. E. 543. Marriage is the highest and most valuable of considerations. And when a conveyance is made upon such a consideration, the grantee if guiltless of fraud, is at least



in as firm and secure a possession as if she had paid in money the full value of the property sold.—Cohen v. Knox, 90 Cal. 264, 27 Pac. 215. So, a voluntary conveyance from husband to wife is not per se fraudulent.—Thomas v. Mackey, 3 Colo. 390. The presumption that every man knows the condition of his own business and that every man intends the consequences of his acts are disputable, and inference of the fact of fraudulent intent from a deed of gift by an insolvent debtor to his wife which

might rest upon those presumptions is overcome by a finding that he was ignorant of the fact of his insolvency.—Bull v. Bray, 89 Cal. 286, 26 Pac. 873. But the notice to a purchaser of goods of the intention of the seller to defraud his creditors may be inferred from the evidence that the price paid by the purchaser for the goods was less than their real value.—Van Raalte v. Harrington (Mo.), 11 L. R. A. 424, 14 S. W. 710.

### **Section 2469. Effect of this Chapter on Purchaser:**

The provisions of this chapter do not in any manner affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

1887 R. S. Sec. 3023.

**BONA FIDE PURCHASER:** The plaintiff bought cattle from his daughter, but paid no cash therefor; the agreement being that sums already advanced to her, and the expense of her board, should be considered as part payment, the rest to be paid upon the disposal of the cattle. Held, that the father was not a bona fide purchaser.—Perkins v. McCullough (Or.), 49 Pac. 861. A debtor conveyed lands to his

wife in fraud of his creditors. Afterwards a creditor sued the husband, and the sheriff levied upon the interest of the husband in the land by filing a copy of the writ and notice of attachment in the county auditor's office. Held, that a subsequent purchaser from the wife for value without actual notice of the levy was a bona fide purchaser without notice of any incumbrance.—Clerf v. Montgomery (Wash.), 46 Pac. 1028.

## **CHAPTER CII.**

### **HOMESTEADS.**

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### **Section 2470. Of what Homestead Consists: The**

homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided.

1887 R. S. Sec. 3035; 1875 Comp. Laws, p. 625, part of Sec. 1.

**RESIDENCE AND USE:** Only property actually occupied as a family residence when the declaration is filed can be claimed as a homestead.—*Maloney v. Hefer*, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. 539; *Tomlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Aucker v. McCoy*, 56 Cal. 524; *Bebb v. Crowe* (Kan.), 18 Pac. 223; *Skinner v. Hall*, 69 Cal. 195, 10 Pac. 406; *Power v. Burd*, 18 Mont. 22, 43 Pac. 1094; *In re Crowey*, 71 Cal. 300, 12 Pac. 230; *Bank v. Hollingsworth*, 78 Iowa, 575, 6 L. R. A. 92, 43 N. W. 536; *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637, note 643; *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145, 16 Am. St. Rep. 108, note 112; *Tromans v. Mahlman*, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579; a person cannot lawfully hold two homesteads at the same time.—*Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, note 775, 3 S. W. 840; *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831. A homestead right can not be asserted merely to a building, independent of the land on which it is situated.—*Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533, note 537. Homestead may be part community property and part separate property. — *Arendt v.*

*Mace*, 76 Cal. 315, 9 Am. St. Rep. 207, note 209, 18 Pac. 376. The homestead character of the premises is not destroyed, either in whole or in part, by the fact that the husband and wife use part of the building for doing their work as artisans.—*In re Ogburn*, 105 Cal. 95, 38 Pac. 498; nor by a use of part of the building for conducting a retail grocery trade.—*Ruch v. Gordon* (Kan.), 16 Pac. 700. The fact that the homestead is occupied in whole or in part as a hotel does not deprive it of any of the benefits or immunities prescribed by the statutes, so long as it is used and occupied by the owner as a home and residence of himself and family, and is within the limitation of the statute as to value.—*Kiesel v. Clemens et al.* (Idaho), 56 Pac. 84; *King v. Welborn*, 83 Mich. 195, 9 L. R. A. 803, 47 N. W. 106, contra. See *In re McDowell's Estate* (Cal.), 35 Pac. 1031.

Selection of homestead: Sec. 2495.

Exemption of homestead: Sec. 2473.

Abandonment of homestead: Sec. 2476.

Value of homestead: Sec. 2493.

Setting apart homestead for decedent's family: Code Civ. Pro. Sec. 4119 et seq.

**Section 2471. From what Homestead May be Selected:** If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married, but is the head of a family, the homestead may be selected from any of his or her property.

1887 R. S. Sec. 3036.

**FROM WHAT PROPERTY HOMESTEAD MAY BE SELECTED:** The statutes are based upon the idea that the community property and separate property of the husband shall first be devoted to the purpose of a homestead.—*Gee v. Moore*, 14 Cal. 472; *Riley v. Pehl*, 23 Cal. 71; *Shelton v. Orr*, 89 Tenn. 82, 12 L. R. A. 514, 16 S. W. 142. If property is the separate property of either husband or wife or community property before it becomes a homestead, it assumes its former character when the homestead is abandoned.—

*Johnson v. Bush*, 49 Cal. 198. A person having a naked possession only, of land may acquire a homestead right thereto, unless restricted by statute. He may protect whatever title he has from forced sale.—*Spencer v. Geissman*, 37 Cal. 96, 99 Am. Dec. 248; *Brooks v. Hyde*, 37 Cal. 366; *King v. Gotz*, 70 Cal. 236, 11 Pac. 656; *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244; *Waterson v. Bonner Co.* 19 Mont. 554, 61 Am. St. Rep. 528, 48 Pac. 1108; *Hogan v. Manners*, 23 Kan. 551, 33 Am. Rep. 199; *Kaser v. Haas*, 27 Minn. 410, 7 N. W. 824.

**Section 2472. When Selected from Wife's Separate Estate:** The homestead cannot be selected from the separate property of the wife without her consent, shown by her making the declaration of homestead.

1887 R. S. Sec. 3037.



**Section 2473. Homestead and Proceeds Exempt from Execution:** The homestead, and the proceeds thereof in the event of a voluntary sale and also the insurance thereon, if any, in the event of a loss, are exempt from execution or forced sale, except as in this chapter provided.

1887 R. S. Sec. 3038 and laws 1899, 5th Ses. p. 293; 1875 Comp. Laws, p. 628, Sec. 3.

**EXEMPTION FROM EXECUTION:** The homestead, except in the cases given in section 2474, no matter what may be its actual value, cannot be subjected to execution or forced sale except in the manner pointed out in this chapter.—*Barrett v. Sims*, 59 Cal. 615. Note to *Filley v. Duncan*, 93 Am. Dec. 351; *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762, note 771; *Gee v. Moore*, 14 Cal. 472. Exemption is a personal right and cannot be transferred.—*Bowman v. Norton*, 16 Cal. 214.

**SALE AT MORTGAGE FORECLOSURE:** Homestead property may be sold under mortgage foreclosure, if the mortgage was executed as required by statute to make it a lien on such homestead.—*Peterson v. Hornblower*, 33 Cal. 266; *Patterson v. Taylor*, 15 Fla. 342; *Verdier v. Bigne*, 16 Or. 210, 19 Pac. 64.

**INSOLVENCY PROCEEDINGS:** An order of court in an insolvency proceeding for the sale of the homestead of the insolvent, is without jurisdiction, and a sale thereunder passes no title.—*Barrett v. Simms*, 62 Cal. 440; *Dascey v. Harris*, 65 Cal. 361, 4 Pac. 205; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. 1145.

**ATTACHMENT:** Under the laws of Idaho as they existed prior to 1899 a home purchased with the proceeds of

the sale of a homestead was not exempt from execution or attachment prior to the filing of a declaration of homestead.—See *Wright v. Westheimer*, 2 Idaho, 962, 28 Pac. 430. When affidavits in support of a motion to discharge an attachment only go to the question as to whether the property levied upon is a homestead or not, they are insufficient to authorize a judge at chambers to dissolve the attachment.—*Mason v. Lieualen* (Idaho), 39 Pac. 1117. And the homestead character of property cannot be determined in such proceeding.—*Id.* Where a homestead was declared after an attachment on the land and judgment in a justice's court, but no abstract of the judgment had been filed or recorded in the recorder's office, it was held that the property was not subject to sale under such attachment and judgment.—*Wilson v. Maddison*, 58 Cal. 1; *Beaton v. Reid*, 111 Cal. 484; 44 Pac. 167; note to *Blue v. Blue*, 87 Am. Dec. 273.

**DEFICIENCY JUDGMENT:** If a declaration of homestead is filed and recorded before a deficiency judgment for the balance due from a mortgage foreclosure is ascertained and docketed, such deficiency judgment cannot be collected by sale of the homestead property under execution.—*Culver v. Rogers*, 28 Cal. 221; *Reeves v. Peterman*, 109 Ala. 369, 19 So. 512; *Jacoby v. Distilling Co.* 41 Minn. 230, 43 N. W. 52; *Kelly v. Sparks*, 54 Fed. 72.

**Section 2474. Homestead Subject to Execution, when:** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; or in an action in which an attachment was levied upon the premises before the filing of such declaration;
2. On debts secured by mechanics', laborer's or vendor's liens upon the premises;
3. On debts secured by mortgages upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant;
4. On debts secured by mortgages upon the premises, executed and recorded before the declaration of homestead was filed for record.

1887 R. S. Sec. 3039; 1875 Comp. Laws, p. 628, Sec. 2.

**VENDOR'S LIEN** Land on which a

vendor's lien exists for the purchase money may become a homestead, but the homestead right is subordinate to

the lien.—*McHendry v. Reilly*, 13 Cal. 76; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Hopper v. Parkinson*, 5 Nev. 238; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571.

**PRIOR JUDGMENT** A prior lien acquired before the filing of a declaration of homestead subjects such property to sale under execution, and such lien cannot be divested by any subsequent act of the owners.—*Smith v. Richards*, 2 Idaho, 464, 21 Pac. 419; *Bartholomew v. Hook*, 23 Cal. 278; *Noble v. Hook*, 24 Cal. 638; *Gage v. Neblett*, 57 Tex. 374. Contra; *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099, 4 Am. St. Rep. 674. For a discussion of this subject see note to *Vanstory v. Thornton*, 34 Am. St. Rep. 492-506. But if after a judgment is docketed, the wife file a declaration of homestead, she can compel the judgment creditor to exhaust the husband's personal property before selling the homestead.

**Section 2475. Homestead, How Conveyed or Incumbered:** The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife.

1887 R. S. Sec. 3040; 1875 Comp. Laws, p. 628, part of Sec. 2.

**CONVEYANCE OF HOMESTEAD.** It does not matter when or how the homestead was acquired or whether it was common or separate property; it can only be conveyed in the manner prescribed by law. The husband and wife must both join in a conveyance of the homestead.—*Wea Gas. etc. Co. v. Franklin Land Co.* 54 Kan. 533, 38 Pac. 790; *Law v. Butler*, 44 Minn. 482, 9 L. R. A. 856, 47 N. W. 53; *Lies v. DeDiablar*, 12 Cal. 328; *Gimmy v. Doane*, 22 Cal. 635; *Flege v. Garvey*, 47 Cal. 371; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715; *Gagliardo v. Dumont*, 54 Cal. 499; *Schermerhorn v. Mahaffie*, 8 Pac. 199; *Bunting v. Saltz*, 24 Pac. 167; *Alexander v. Jackson*, 28 Pac. 593; *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762; *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507; *Ring v. Burt*, 17 Mich. 465, 97 Am. Dec. 200; *Larson v. Reynolds*, 13 Iowa, 579, 81 Am. Dec. 444; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Welch v. Rice*, 98 Am. Dec. 556. To make a valid sale of the homestead requires a joint deed of the husband and wife. Separate deeds of the husband and wife are both invalid.—*Poole v. Gerard*, 6 Cal. 71, 65 Am. Dec. 481, note 482; *Barber v. Barber*, 36 Cal. 11; *Watts v. Gallagher*, 97 Cal. 47, 31 Pac. 626. It is not necessary that a conveyance of homestead property contain an express waiver of the

—*Bartholomew v. Hook*, supra; *Frick Co. v. Ketels*, 42 Kan. 527, 16 Am. St. Rep. 507, 22 Pac. 580.

**MORTGAGES** A mortgage lien can not be defeated by a declaration of homestead made after the mortgage lien attaches.—*Law v. Spence* (Idaho), 48 Pac. 282.

**JUDGMENT, JUSTICE'S COURT:**

The lien of a judgment in a justices' court does not attach until an abstract of the judgment is filed in the office of the county recorder.—*Wilson v. Madison*, 58 Cal. 1; *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167.

**EXCHANGE OF LANDS:** Where lands upon which a homestead has been filed is exchanged for other lands previously occupied by the claimants, and homestead was filed on the second land at the same time the conveyances were executed, they were not subject to sale by execution.—*Eby v. Foster*, 61 Cal. 282.

homestead rights.—*Drake v. Root*, 2 Colo. 685. The husband cannot dedicate any part of the homestead to public use.—*San Francisco v. Grote*, 120 Cal. 59, 52 Pac. 127. A general power of attorney given by the wife to her husband is not sufficient to give her consent to a conveyance of the homestead.—*Wallace v. Travellers' Ins. Co.* 54 Kan. 442, 26 L. R. A. 806, 38 Pac. 489; *Gagliardo v. Dumont*, supra; *Burkett v. Burkett*, supra.

**INCUMBRANCE OF HOMESTEAD.** The husband and wife must both sign mortgage upon property upon which there is a valid and subsisting homestead, or the mortgage will be void.—*Powell v. Pattison*, 100 Cal. 236, 34 Pac. 677; *Gleason v. Spray*, 22 Pac. 551; *Jenkins v. Simmons*, 15 Pac. 522; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Revalk v. Kraemer*, 68 Am. Dec. 304; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732. And it does not change this requirement that the homestead was taken from the husband's separate property.—*Anderson v. Steadman*, 17 Wash. 433, 49 Pac. 1070. If the acknowledgment of the wife to the mortgage of homestead property is substantially defective, the mortgage is void.—*American Sav. & Loan Ass'n. v. Burghardt* (Mont.), 48 Pac. 391. A lease signed by the husband alone for a long term of years is void.—*Wea Gas. etc. Co. v. Franklin Land Co.* 54 Kan. 533, 38 Pac. 790. In an action to



foreclose a mortgage on homestead property, the wife must be made a party.—*Brackett v. Banegas*, 116 Cal. 278, 48 Pac. 90. In Washington it was held that a general power of attorney from the wife to the husband conferred upon him power to execute a mortgage on the homestead property.—*Oregon Mortgage Co. v. Hersner*, 14 Wash. 515, 45 Pac. 40. But see *Laughlin v. Wright*, 63 Cal. 315. A pledge of

property insured in a mutual insurance company as security for payment of the owner's share of the debts and liabilities of the company is a mortgage within the meaning of the statute restricting the modes of waiving homestead rights to alienation or mortgage of the property.—*Farmers' Mutual Ins. Ass'n. v. Burch*, 47 S. C. 453, 34 L. R. A. 806, 25 S. E. 211.

**Section 2476. Homestead, How Abandoned:** A homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged:

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

1887 R. S. Sec. 3041; 1875 Comp. Laws, p. 628, part Sec. 2.

**ABANDONMENT OF HOMESTEAD:** A homestead once lawfully created can only be abandoned in the way provided by statute. It is not abandoned by the claimant's ceasing to reside on the premises nor by a lease thereof and the purchase of other property upon which they have erected another home in which they are residing.—*Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87; *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145; *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237; *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; *Bull v. Coe*, 15 Pac. 123; *Kennedy v. Gloster*, 32 Pac. 941. Filing a new homestead is an abandonment of the old one.—*Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792, 10 S. W. 458; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840. A temporary removal from the homestead with intention to return does not constitute an abandonment.—*Harper v. Forbes*, 15 Cal. 202; *Moss v. Warner*, 10 Cal. 296; *Tipton v. Martin*, *supra*; *Waggle v. Worthy*, 74 Cal. 266, 15 Pac.

831; *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404; *Boot v. Brewster*, 75 Iowa 631, 9 Am. St. Rep. 515, 36 N. W. 649; *Lies v. DeDiablar*, 12 Cal. 327. A deed of a homestead signed by a husband and wife but intended as a mortgage is not an abandonment of the homestead.—*Osborne v. Schoonmaker* (Kan.), 28 Pac. 711; *Bull v. Coe*, 17 Cal. 54, 18 Pac. 808; *Merced Bank v. Rosenthal*, 31 Pac. 849, 33 Pac. 732. A homestead is not abandoned by using it or permitting it to be used in some other manner inconsistent with the homestead interests without the consent of the wife.—*Hoffman v. Hill* (Kan.), 28 Pac. 623. The law has prescribed no form of words for the abandonment of the homestead, and the meaning of an instrument intended to have that effect is to be determined by the rules which control the interpretation of other contracts. It is not necessary that the instrument shall expressly refer to the property as a homestead in order to operate as an abandonment thereof, where such abandonment follows from the provisions of the instrument.—*Estate of Winslow*, 121 Cal. 92, 53 Pac. 362.

**Section 2477. Declaration of Abandonment, when Effectual:** A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

1887 R. S. Sec. 3042.

**Section 2478. Judgment Creditor May Have Homestead Appraised:** When an execution for the enforcement of a judgment, obtained in a case not within the classes before enumerated, is levied upon the homestead, the judgment creditor may apply to the probate judge of the county in which the homestead is situated for the appointment of persons to appraise the value thereof.

1887 R. S. Sec. 3043; 1875 Comp. Laws, p. 628, part Sec. 3.

**APPRAISING HOMESTEAD:** The

homestead, no matter what may be its actual value, cannot be subjected to execution or forced sale, except in the

manner pointed out in this and subsequent sections. There is no lien of the judgment upon a homestead until the levy of an execution, and the levy creates no lien except for the purpose of, and as a foundation for instituting and carrying on proceedings to have appraisal and sale under the statutes.

—Barrett v. Sims, 59 Cal. 615; Sanders v. Russell, 86 Cal. 119, 21 Am. St. Rep. 27, 24 Pac. 852; Van Story v. Thornton, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483 and note 492; Brown v. Starr, 79 Cal. 608, 12 Am. St. Rep. 180, 21 Pac. 973.

Value of homestead: Sec. 2492.

**Section 2479. Application for Appraisement, what Must Show:** The application must be made upon a verified petition, showing:

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption.

1887 R. S. Sec. 3044.

**Section 2480. Petition for Appraisement, where Filed:** The petition must be filed with the clerk of the probate court.

1887 R. S. Sec. 3045.

**Section 2481. Copy of Petition and a Notice Must be Served:** A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant, at least two days before the hearing.

1887 R. S. Sec. 3046.

**Section 2482. Appointment of Appraisers:** At the hearing the judge may, upon the proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead.

1887 R. S. Sec. 3047; 1875 Comp. Laws, p. 628, part of Sec. 3.

**HEARING:** Under the provisions for the appraisal of a household, no demurrer or answer to a petition is authorized. If the petition is sufficient and a copy thereof with notice of the time and place of hearing has been served upon the homestead claimant, at least two days before the hearing, it is the duty of the judge upon proof thereof, and of the facts stated in the

petition, to appoint appraisers. No formal trial of issues is contemplated, nor any findings, or new trials, but the homestead claimant is entitled to a hearing upon application without any pleading on his part.—Stone v. McCann, 79 Cal. 460, 21 Pac. 863; Demartin v. Demartin, 85 Cal. 71, 24 Pac. 594. Mandamus will lie to compel the appointment of appraisers.—Water Co. v. Cowles, 31 Cal. 215.

**Section 2483. Appraisers Must Take Oath:** The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

1887 R. S. Sec. 3048.

**Section 2484. Duty of Appraisers:** They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury.

1887 R. S. Sec. 3049; 1875 Comp. Laws, p. 628, part of Sec. 3.

**Section 2485. Must Report within Ten Days:** Within ten days after their appointment they must make to the judge a



report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed.

1887 R. S. Sec. 3050.

A proceeding to have a homestead appraised at the instance of the judgment creditor is not a proceeding in a case in which the judgment was rendered. And where the appraisers report that the property is of a certain value and the court remands the mat-

ter back to them with instructions to make a division of the property, the order does not amount to a final judgment, and the appraisers must make a report of such further action to the court, which must be confirmed or rejected after reasonable notice.—*Brown v. Starr*, 75 Cal. 163, 16 Pac. 760.

### **Section 2486. Division of Land, when to be Made:**

If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land.

1887 R. S. Sec. 3051; 1875 Comp. Laws, p. 628, part of Sec. 3.

**Section 2487. When not Divisible Must be Sold:** If, from the report it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution.

1887 R. S. Sec. 3052; 1875 Comp. Laws, p. 628, part Sec. 3.

A creditor's right to have his debt satisfied by a sale of debtor's land does not exist except as given by statute. An exemption given by homestead statutes should be liberally construed in accordance with their equity and spirit. And no valid sale of a

homestead properly selected can be made until after it is appraised as provided by statute, and found to exceed in value the amount allowed, or until after its division, if it is found capable of being divided.—*Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705.

**Section 2488. Limitation on Bids at Such Sale:** At such sale no bid must be received, unless it exceeds the amount of the homestead exemption.

1887 R. S. Sec. 3053; 1875 Comp. Laws, p. 629, part Sec. 3.

**EXECUTION SALE:** A sale by a sheriff under execution of property claimed as a homestead, by the defendant in execution, and ascertained by appraisement to be worth over \$5000

should not be made until an exact appraisement of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein.—*Gary v. Eastabrook*, 6 Cal. 458; *McDonald v. Badger*, 23 Cal. 394; *Barrett v. Sims*, 59 Cal. 415.

**Section 2489. Disposition of Proceeds of Sale:** If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution.

1187 R. S. Sec. 3054; 1875 Comp. Laws, p. 629, part Sec. 3.

**Section 2490. Money Paid to Homestead Claimant Exempt, How Long:** The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead.

1887 R. S. Sec. 3055; 1875 Comp. Laws, p. 629, part Sec. 3.

### **Section 2491. Compensation of Appraisers, How**

**Fixed:** The court must fix the compensation of the appraisers, not to exceed five dollars per day each for the time actually engaged.

1887 R. S. Sec. 3056.

**Section 2492. Costs of Proceeding, by Whom Paid:**

The execution creditor must pay the costs of these proceedings in the first instance; but if the appraised value exceeds the homestead exemption the amount so paid must be added as costs on execution, and collected accordingly.

1887 R. S. Sec. 3057.

**Section 2493. Maximum Value of Homestead:** Homesteads may be selected and claimed:

1. Of not exceeding five thousand dollars in value by any head of a family;
2. Of not exceeding one thousand dollars in value by any other person.

1887 R. S. Sec. 3058; 1875 Comp. 2496.  
Laws, p. 627, part Sec. 1.

Declaration must be recorded in office of county recorder: Sec. 2497.  
Declaration, estimated value: Sec.

**Section 2494. "Head of a Family," Meaning of:** The phrase "head of a family," as used in this title, includes within its meaning:

First. The husband or wife when the claimant is a married person;

Second. Every person who has residing on the premises with him or her and under his or her care and maintenance either:

(1.) His or her minor child, or the minor child of his or her deceased wife or husband;

(2.) A minor brother or sister, or the minor child of a deceased brother or sister;

(3.) A father, mother, grandfather or grandmother;

(4.) The father, mother, grandfather or grandmother of a deceased husband or wife;

(5.) An unmarried sister, or any other of the relatives mentioned in this Section who have attained the age of majority, and are unable to take care of or support themselves.

1887 R. S. Sec. 3059; 1875 Comp. Laws, p. 627, Sec. 4.

**HEAD OF FAMILY:** Any individual, whether married or not, may be the head of a family, and as such, entitled to a homestead right.—*Revalk v. Kraemer*, 8 Cal. 66; *McQuade v. Whaley*, 31 Cal. 535. An unmarried woman who has the care and custody of her minor child may select a homestead.—*Ellis v. White*, 47 Cal. 73; *Lane v. Phillips*, 69 Tex. 240, 5 Am. St. Rep. 41, 6 S. W. 610. So may a widow who lives with, and supports her minor step children.—*Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. Rep. 484, 12 S. E. 943. A mulatto may have the advantage of the statutes relating to homesteads.—*Williams v. Young*, 17

Cal. 403. Widow to whom the probate court has set apart a homestead out of the estate of her deceased husband may, if she afterwards marries, claim a second homestead.—*Higgins v. Higgins*, 46 Cal. 259. The wife is the head of a family while occupying with her husband her property as a home.—*McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579, 15 Pac. 420. And this is true where the husband has left the state and desires her to follow him, while she remains with her minor child upon the homestead left by him.—*McDanell v. Ragsdale*, 71 Tex. 23, 10 Am. St. Rep. 729, 8 S. W. 625. A son with whom his mother resides under his care and maintenance, is the head of a family.—*Roth v. Insley*, 86 Cal. 134, 24



Pac. 853. And one who has residing with him those so connected with him by blood or ties of residence and association as to become part of his household.—*Moyer v. Drummond*, 32

S. C. 165, 17 Am. St. Rep. 850, 10 S. E. 952. For a general discussion of what constitutes a head of a family, see note to *Wade v. Jones*, 61 Am. Dec. 585.

#### HOMESTEAD OF THE HEAD OF A FAMILY.

**Section 2495. Mode of Selecting Homestead:** In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a conveyance of real property is acknowledged, a declaration of homestead, and file the same for record.

1887 R. S. Sec. 3070; 1875 Comp. Laws, p. 627, part Sec. 1.

**SELECTION OF HOMESTEAD:** Where a homestead is selected by a married woman, she must execute and acknowledge the declaration in the same manner as required in the acknowledgment of a conveyance of real property by a married woman.—*Burbank v. Kirby* (Idaho), 55 Pac. 295; *Beck v. Soward*, 76 Cal. 531, 18 Pac. 650; *Kennedy v. Gloster*, 98 Cal. 148, 32 Pac. 941. A declaration by a married woman is valid though her husband does not reside on the premises.—*Gambette v. Brock*, 41 Cal. 78. A widow is a head of a family in con-

templation of the homestead statutes, and the benefits thereof are secured to her as the wife surviving her husband.—*Coughanour v. Hoffman*, 2 Idaho, 267, 13 Pac. 231. The declaration of homestead by a wife must show that the husband has failed to make a selection of the homestead and that she makes such selection for their joint benefit.—*Wilcox v. Deere* (Idaho), 51 Pac. 98; *Booth v. Galt*, 58 Cal. 254; *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535. There can be no legal homestead without a selection and the record of a declaration thereof.—*Bank v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070.

**Section 2496. What Declaration of Homestead Must Contain:** The declaration of homestead must contain:

1. A statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;
2. A statement that the person making it is residing on the premises, and claims them as a homestead;
3. A description of the premises;
4. An estimate of their actual cash value.

1887 R. S. Sec. 3071; 1875 Comp. Laws, p. 627, part Sec. 1.

**DECLARATION:** The declaration must show that the person making it is the head of a family.—*Jones v. Waddy*, 66 Cal. 457, 6 Pac. 92, and Sec. 2494, and note.

**SELECTION BY WIFE:** When the selection is made by the wife, she must state in her declaration that the husband has failed to make a declaration of homestead, and that therefore she makes it for the benefit of both.—*Wilcox v. Deere* (Idaho), 51 Pac. 98; *Booth v. Galt*, 58 Cal. 254; *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737.

**RESIDENCE:** A declaration must show that the claimant actually resided on the premises at the time the declaration is filed.—*Babcock v. Gibbs*, 52 Cal. 629; *Dorn v. Howe*, 52 Cal. 635.

*Pfister v. Dasey*, 68 Cal. 573, 10 Pac. 117; *Lubbock v. McMann*, 82 Cal. 228, 16 Am. St. Rep. 110, 22 Pac. 1145; *Power v. Burd*, 18 Mont. 26, 43 Pac. 1094; *Auker v. McCoy*, 56 Cal. 527; *King v. Gotz*, 70 Cal. 239, 11 Pac. 656; *Gaylord v. Place*, 98 Cal. 478, 33 Pac. 484.

**DESCRIPTION:** A description in a declaration of homestead need not be more particular than in a conveyance.—*Ornbaum v. Creditors*, 61 Cal. 455; *Schuyler v. Broughton*, 76 Cal. 524, 18 Pac. 436; *Quackenbush v. Reed*, 102 Cal. 500, 37 Pac. 755; *Gentile v. Crossan*, 7 N. Mex. 598, 38 Pac. 247. A declaration of homestead which describes certain town lots and also 160 acres of farm land alleging "on a portion of which claimant with his family is residing" is void for indefiniteness.

—Wilcox v. Deere (Idaho), 51 Pac. 98.

**ESTIMATED VALUE:** A declaration of homestead which fails to contain an estimate of the actual cash value of the property is void.—Ashley v. Olmstead, 54 Cal. 616; Ames v. Eldred, 55 Cal. 136; Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436; Read v. Rahm, 65 Cal. 343, 4 Pac. 111; Southwick v. Davis, 78 Cal. 504, 21 Pac. 121.

**STATUTE MUST BE STRICTLY COMPLIED WITH:** The provisions of the above section are mandatory and must be strictly complied with.—Burbank v. Kirby (Idaho), 55 Pac. 295; Wilcox v. Deere (Idaho), 51 Pac. 98;

Ashley v. Olmstead, 54 Cal. 616; Ames v. Eldred, 55 Cal. 136; Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436.

Occupancy as a residence and value are the only limitations placed upon the homestead by the statutes of Idaho.—Kiesel v. Clemens (Idaho), 56 Pac. 84. The fact that the homestead is occupied in whole or in part as a hotel does not deprive it of any of the benefits or immunities prescribed by the statutes so long as it is used and occupied by the owner as a home and residence of himself and family, and is within the limitations of the statute as to value.—Id.

### **Section 2497. Declaration Must be Recorded where:**

The declaration must be recorded in the office of the recorder of the county in which the land is situated.

1887 R. S. Sec. 3072; 1875 Comp. Laws, p. 627, part Sec. 1.

**Section 2498. Homestead Right Attaches When.**  
**Succession:** From and after the time the declaration is filed for record, the premises therein described, constitute a homestead. If the selection was made by a married person from the community property, the land on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this Chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the probate court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this Chapter.

1887 R. S. Sec. 3073; 1875 Comp. Laws, p. 628, part Sec. 1.

**RIGHTS OF SURVIVING SPOUSE:** Community property duly dedicated as a homestead upon the death of one of the spouses becomes the sole property of the survivor and is protected as such to the survivor in the same manner as before it had been protected to the community by its homestead character.—Sanders v. Russell, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26, note 28; Collins v. Scott, 100 Cal. 446, 34 Pac. 1085; In re Walkerly, 81 Cal. 579, 22 Pac. 888; In re Ackerman, 80 Cal. 208, 22 Pac. 141; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116; Robinson v. Dougherty, 118 Cal. 229, 50 Pac. 649.

**SEPARATE PROPERTY:** A homestead selected from the separate property of either spouse descends to the heirs of such person upon the death of the one whose property was selected

subject to the power of the probate court to set aside the homestead, for a limited time, to the use of the family.—Beck v. Soward, 76 Cal. 527, 18 Pac. 650; Note to Sanders v. Russell, 21 Am. St. Rep. 28; Hutchinson v. McNally, 85 Cal. 619, 24 Pac. 1071; Neary v. Godfrey, 102 Cal. 338, 36 Pac. 655; Weinrich v. Hensley, 121 Cal. 647, 54 Pac. 254.

Setting apart homestead for the use of the family by probate court: Code Civil Procedure, Sec. 4119 et seq.

The homestead does not constitute any portion of the assets subject to the debts of the deceased.—Estate of Tompkins, 12 Cal. 114; Schadt v. Heppe, 45 Cal. 433; Estate of Burton, 63 Cal. 36; McCloy v. Trotter, 47 Ark. 454; Smith v. Shrieves, 13 Neb. 325; Durland v. Seiler, 27 Neb. 37, 42 N. W. 741; In re Ackerman, 80 Cal. 208, 22 Pac. 141, 13 Am. St. Rep. 116; Estate of Gilmore, 81 Cal. 240, 22 Pac. 655.

### **HOMESTEAD OF OTHER PERSONS.**

**Section 2499. Mode of Selecting Homestead:** Any person other than the head of a family, in the selection of a home-



stead, must execute and acknowledge, in the same manner as a conveyance of real property is acknowledged, a "declaration of homestead."

1887 R. S. Sec. 3085.

**Section 2500. What Declaration Must Contain:** The declaration must contain everything required by the second, third and fourth Subdivisions of the Section prescribing the declaration of the head of a family.

1887 R. S. Sec. 3086.

**Section 2501. Declaration Must be Recorded where:** The declaration must be recorded in the office of the county recorder of the county in which the land is situated.

1887 R. S. Sec. 3087.

**Section 2502. Homestead Right Attaches when:** From and after the time the declaration is filed for record, the land described therein is a homestead.

1887 R. S. Sec. 3088.

## CHAPTER CIII.

### WILLS.

Section.

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**Section 2503. Who May Make a Will:** Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter CIV of this

Title, being chargeable in both cases with the payment of all the decedent's debts, as provided in the Code of Civil Procedure.

1887 R. S. Sec. 5725.

**UNSOUND MIND:** A grantor who has mental capacity sufficient to understand ordinary business transactions at the time he disposes of his property is competent to make such disposal.—*Kelly v. Perrault* (Idaho), 48 Pac. 45; *Gwin v. Gwin* (Idaho), 48 Pac. 295. A will is not invalidated by delusions of a testatrix which do not relate to persons or subjects affected by it.—*In re Redfield's Estate*, 116 Cal. 737, 48 Pac. 794. A person of sound mind is one who has full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses and an intelligent perception and understanding of the disposition he desires to make of it, and the persons he desires shall be the recipients of his bounty. But it is not necessary that he should have sufficient capacity to make contracts and do business generally.—*Meeker v.*

*Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489, 37 N. W. 773; *Waddington v. Buzby*, 46 N. J. Eq. 173, 14 Am. St. Rep. 706; *Den v. Johnson*, 8 Am. Dec. 610. *Chrisman v. Chrisman* (Or.), 18 Pac. 6. *Clements v. McGinn*, 33 Pac. 920; *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. 493; *Richmond's App.* 59 Conn. 226, 21 Am. St. Rep. 85, 22 Atl. 82; *Kirkwood v. Gordon*, 62 Am. Dec. 418. The impairment of the mind of a testator by age and disease need not amount to lunacy or absolute imbecility in order to make his will invalid.—*Campbell v. Campbell*, 130 Ill. 466, 6 L. R. A. 167, 22 N. E. 620. The probate court has exclusive jurisdiction in regard to the validity of wills.—*Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814.

Wills of married women: Sec. 2504.

Wills of unmarried women revoked by marriage: Sec. 2515.

Olographic wills: Sec. 2506.

**Section 2504. Married Woman May Make Will:** A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed, and proved in like manner as all other wills.

1887 R. S. Sec. 5726.

**WILL OF MARRIED WOMAN:** Under the statutes of Idaho a married

woman is not empowered to make an olographic will.—*Scott v. Harkness* (Idaho), 59 Pac. 556.

**Section 2505. Wills Must be in Writing; Exception. How Executed:** Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them, to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.

1887 R. S. Sec. 5727.

**EXECUTION OF WILL:** 1. *Signing.*—Signing by mark is a sufficient signature by the testator.—*In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Sheehan v. Kearney* (Miss.), 35 L. R. A. 102. It is a sufficient signing if the name of the testator is signed by some one at

his request in his presence.—*Ex parte Leonard*, 39 S. C. 518, 22 L. R. A. 302, 18 S. E. 216. The first name only may be a sufficient signature to a will where it is clearly intended as a complete execution of the instrument.—*Knox's App.* 131 Pa. 220, 6 L. R. A. 353, 18 Atl. 1021. Will is not "subscribed at the end" as



required by statute where the signature is in the usual place on the face of the printed blank consisting of a half sheet, and just before this in brackets are the words "Carried to back of will" and on the back the word "continued" followed by important provisions at the end of which are the words "Signature on face of will."—*In re Will of Conway*, 124 N. Y. 455, 11 L. R. A. 796, 26 N. E. 1028. The signature may also be by mark when one is physically too weak to sign his name.—*In re Guilfoyle's Will*, 96 Cal. 598, 31 Pac. 553. A subscription by a testator after the attestation clause is "at the end of the will" and valid.—*Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156. The hand of a testator may be guided when signing if he is incapable from blindness, or nervous debility.—*Ray v. Hill*, 49 Am. Dec. 647; *Rosser v. Franklin*, 52 Am. Dec. 97.

2. Publication: It is a sufficient publication where the testator in response to the question of his attorney "What is this instrument?" responded "That is my will."—*In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645. It is sufficient if enough is done and said in the presence, and with the knowledge of a testator, to make the witnesses understand distinctly that he desires them to know that the paper is his will.—*Elkinton v. Brick*, 1 L. R. A. 161, 15 Atl. 391; *Estate of Johnson*, 57 Cal. 529; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.

3. Attestation: Where a witness in attesting a will inadvertently wrote the surname of the testator instead of his own, there was no sufficient compliance with a statute providing that each of the attesting witnesses must sign his name at the end of the will.—*In re Walker's Estate*, 110 Cal. 387, 42 Pac. 815. A signature of a subscribing witness may be written by another such witness in the presence and at the request of the former.—*In re Crawford*, 46 S. C. 299, 32 L. R. A. 77, 24 S. E. 69. It must be shown that witnesses who subscribed their names to a will did so at the request of the testator, that they saw him sign it or heard him acknowledge his signature, or observed acts which unmistakably indicated that he had signed it.—*Luper v. Werts (Or.)*, 23 Pac. 850. The signature of a witness who does not make any mark on the instrument or touch the pen which makes the signature, although written at his request, and in his presence, is not sufficient.—*Push v. McFarland*, 94 Tenn. 538, 27 L. R. A.

662, 29 S. W. 899. Attesting witnesses must see the testator's signature at the time they attest it. It is not sufficient for him to explain to them that he wants them to sign his will and obtain their signatures if the will is so folded that they cannot see whether he has signed it or not.—*In re Mackay*, 110 N. Y. 611, 6 Am. St. Rep. 409, 18 N. E. 433. Due attestation of a will should be inferred from circumstances without direct evidence when attesting clause is in due form.—*Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. The witnesses must sign their names after the will is signed by the testator.—*Brooks v. Woodson*, 87 Ga. 379, 14 L. R. A. 160, 13 S. E. 712. Witnesses must sign their names in the presence of the testator, and signing in an adjoining room is not sufficient, even though he might have seen them writing their names by sitting on the side of his bed.—*Reynolds v. Reynolds*, 40 Am. Dec. 599. A sufficient signing in the presence of testator.—*Ex parte Leonard*, 39 S. C. 518, 22 L. R. A. 302, 18 S. E. 216; *Town v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; *In re Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Reed v. Roberts*, 26 Cal. 294, 71 Am. Dec. 210.

4. Acknowledging: The witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature.—*In re Will of Mackay*, 110 N. Y. 611, 1 L. R. A. 491, 18 N. E. 433; *Cook v. Winchester*, 81 Mich. 581, 8 L. R. A. 822, 46 N. W. 106.

5. Nuncupative Will: The two witnesses to a verbal will must be competent, disinterested witnesses at the time of their attestation.—*Vrooman v. Powers*, 47 Ohio St. 191, 8 L. R. A. 39, 24 N. E. 267. Nuncupative testament by public act need contain no other description of the witnesses than their names, their number, and their residence.—*Succession of Del Escobal*, 42 La. Ann. 1086, 9 L. R. A. 829, 8 So. 268. Nuncupative wills demand strictness of proof in all essential points and to be valid must be executed by the testator while in extremis, as a matter of necessity, and not of choice.—*Scaife v. Emmons*, 84 Ga. 619, 20 Am. St. Rep. 383, 10 S. E. 1097; *Winn v. Bob (Va.)*, 23 Am. Dec. 258; *Yarnell's Will*, 26 Am. Dec. 115; *Dorsey v. Sheppard*, 37 Am. Dec. 77; *Phoebe v. Boggess*, 42 Am. Dec. 543. A signed writing intended as a will but not duly attested, cannot be set up as a nuncupative will.—*Stamper v. Hooks*, 22 Ga. 603, 68 Am. Dec. 511.

Olographic wills: Sec. 2506.

## Section 2506. Olographic Will Defined: An olographic

will is one that is entirely written, dated and signed, by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed.

1887 R. S. Sec. 5728.

**OLOGRAPHIC WILL:** An olographic will must be entirely in the testator's handwriting, and where portions of the paper were printed, and the spaces filled in the handwriting of the deceased, the instrument is not an olographic will.—*Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Estate of Billings*, 64 Cal. 427, 1 Pac. 701; *Estate of Martin*, 58 Cal. 530; *Waller v. Waller*, 42 Am. Dec. 564. This question was considered but not decided, in the case of *Scott v. Harkness* (Idaho), 59 Pac.

556. What writing is sufficient to constitute a valid olographic will.—*Succession of Ehrenberg*, 21 La. Ann. 286, 99 Am. Dec. 729; *Estate of Stratton*, 112 Cal. 513, 44 Pac. 1028; *Perkins v. Jones*, 84 Va. 358, 10 Am. St. Rep. 863, 4 S. E. 833; *In re Schillaber*, 74 Cal. 144, 15 Pac. 453; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614.

**MARRIED WOMEN:** Under the statutes of this state a married woman is not empowered to make an olographic will. — *Scott v. Harkness* (Idaho), 59 Pac. 556.

**Section 2507. Witness to Add His Residence:** A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this Section does not affect the validity of the will.

1887 R. S. Sec. 5729.

**WITNESS SIGNING TESTATOR'S NAME:** A person who signs a testator's name to a will by direction of the testator, must subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request.—*McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129, note 131. The

subscription by a witness to a will, of the name of the testator is a sufficient execution of the will, although the person so signing omits to write his own name nearby as a witness to the signature.—*In re Langan*, 74 Cal. 353, 16 Pac. 188; *Estate of Toomes*, 54 Cal. 509.

**Section 2508. Competency of Subscribing Witness:** If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

1887 R. S. Sec. 5730.

**COMPETENCY OF WITNESSES:** Attesting witnesses to a will must be such as are competent at the date of attestation, and if then competent,

their subsequent incompetency, from whatever cause, will not prevent the probate of the will.—*In re Will of Holt*, 56 Minn. 33, 22 L. R. A. 481, 57 N. W. 219.

**Section 2509. Written Will, how Revoked:** Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

1887 R. S. Sec. 5731.

**REVOCATION OF WILL:** A will may be revoked by proving a subsequent will containing a clause revoking all former wills, although the latter will has been lost or destroyed.—*In re Cunningham*, 38 Minn. 169, 8 Am.

St. Rep. 650, 36 N. W. 269. Though a codicil changing a will must prevail, both must be construed together, and the general intent must be gathered.—*Hunt v. Hunt* (Wash.), 59 Pac. 578; will by a married woman is not revoked by the death of her hus-



band and a subsequent marriage.—In *re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15. It is not necessary that a second will, altering a former one, should state in terms that it is intended thereby to alter such former will.—*Clarke v. Ransom*, 50 Cal. 595. Will may be revoked by cancellation of the signature.—*Estate of Olmsted*, 122 Cal. 224, 54 Pac. 745. The death of a sole beneficiary

under a will which nominates an executor does not render it void.—In *re Hickman's Estate*, 101 Cal. 609, 36 Pac. 118. A testator can not revoke his will by tearing his name off while insane.—*Estate of Lang*, 2 Pac. 491. What not sufficient revocation.—*Miles' Appeal*, 68 Conn. 237, 36 L. R. A. 176, 36 Atl. 39.

**Section 2510. Evidence of Revocation:** When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

1887 R. S. Sec. 5732.

**Section 2511. Revocation of Duplicate, Revokes Will:** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

1887 R. S. Sec. 5733.

**Section 2512. Revocation of Second Will Does not Revive First:** If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished.

1887 R. S. Sec. 5734.

**REVOCATION OF SECOND WILL.** The execution of a second will revokes the first one, and such first will is not revived by the revocation of the last will unless it is revived by the terms of such revocation.—*Lones v. Lones*,

108 Cal. 688, 41 Pac. 771; *Bohanon v. Walcot*, 1 Howard, 336, 29 Am. Dec. 631; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; *Hawes v. Nicholas*, 72 Tex. 481, 2 L. R. A. 863, 10 S. W. 558. But see, *Cheever v. North*, 106 Mich. 399, 37 L. R. A. 561, 64 N. W. 455.

**Section 2513. Marriage and Issue Revoke Will, Exception:** If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

1887 R. S. Sec. 5735.

**REVOCATION BY MARRIAGE AND ISSUE:** An adopted child is not an "issue of the marriage" within the meaning of a statute providing that if a testator marry and have issue of such marriage, his former will is revoked.—In *re Comassi's Estate*, 107 Cal. 1, 40 Pac. 15. The adoption of a

child does not operate to revoke a former will.—*Davis v. Fogle*, 124 Ind. 41, 7 L. R. A. 485, 23 N. E. 860. What amounts to a provision in the will for a child, within the meaning of the statute, see *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584, note 592; *Sanders v. Simcich*, 65 Cal. 50, 2 Pac. 741.

**Section 2514. Marriage Revokes Will, Exception:** If, after making a will the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her

by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

1887 R. S. Sec. 5736.

**REVOCATION BY MARRIAGE, IF WIFE SURVIVES:** A will executed by a man is annulled by a subsequent marriage if his wife survives him.—*Morgan v. Ireland*, 1 Idaho, 786; *Brown*

*v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427; *Scherrer v. Brown*, 21 Colo. 481, 42 Pac. 668; *In re Corker's Estate*, 87 Cal. 645, 25 Pac. 922; but see, *In re Estate of Hulett*, 66 Minn. 327, 34 L. R. A. 384, 69 N. W. 31.

**Section 2515. Will by Unmarried Woman Revoked when:** A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

1887 R. S. Sec. 5737.

**MARRIAGE REVOKES WILL:** The marriage of a woman revokes a will previously executed by her.—*Ellis v. Darden*, 86 Ga. 368, 11 L. R. A. 51, 12 S. E. 652. A widow is an "unmarried woman" within the meaning of the statutes providing that the will of an unmarried woman shall be deemed revoked by her subsequent marriage.—*In re Kaufman*, 131 N. Y. 620, 15 L. R. A. 292, 30 N. E. 242. A will is re-

voked by a subsequent marriage.—*McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552. Under the statutes of Kentucky the will of an unmarried woman is not revoked by her subsequent marriage where it is made in the exercise of a power given under an ante-nuptial contract.—*Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320, note 329, 10 S. W. 125.

**Section 2516. Contract of Sale Not a Revocation:** An agreement by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees as might be had against the testator's successors, if the same had passed by succession.

1887 R. S. Sec. 5738.

The sale of property previously disposed of by will does not revoke such disposal, but the property passes by

the will subject to the right of specific performance.—*Chadwick v. Tatem*, (Mont.), 23 Pac. 729.

**Section 2517. Mortgage not a Revocation of Will:** A charge or incumbrance upon any estate for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or incumbrance.

1887 R. S. Sec. 5739.

**Section 2518. Conveyance, when not a Revocation:** A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

1887 R. S. Sec. 5740.

**CONVEYANCE AS A REVOCATION:** A conveyance by a testator of all lands owned by him at the time of making his will operates as a revocation of the will.—*Bowen v. Johnson*, 6 Ind. 110, 61 Am. Dec. 110; *Cooper's Es-*

*tate*, 4 Pa. St. 88, 45 Am. Dec. 673, note 675. A will passes all the interest in property that the testator had at the time of his death.—*Bruck v. Tucker*, 32 Cal. 426, 42 Cal. 346. See *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249.



**Section 2519. When Instrument is a Revocation:**

If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

1887 R. S. Sec. 5741.

**Section 2520. Revocation of Will Revokes Codicils:**

The revocation of a will revokes all its codicils.

1887 R. S. Sec. 5742.

**Section 2521. Afterborn Child Unprovided for, to Succeed:**

Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

1887 R. S. Sec. 5743.

**AFTER-BORN CHILD PROVIDED FOR:** An after-born child unprovided for by will is entitled to such share of the real and personal estate as it would have been entitled to if the father had died intestate.—*Armistead v. Dangerfield*, 5 Am. Dec. 501; *Woodard v. Spiller*, 25 Am. Dec. 139. The fact that a testator has failed to provide for one of his children in his will will not prevent its being proved, though it does not appear that the omission was intentional, but the will may be modified

after probate in so far as may be necessary for securing the rights of such child.—*Doane v. Lake*, 32 Me. 268, 52 Am. Dec. 654. Where a testator in his will makes such an allusion to a child as to show that he had not forgotten to consider such child in the distribution of his estate, it will be sufficient to exclude such child from a distributive share in the estate of the testator, and it is not necessary that the child shall have a legacy in the will.—*Terry v. Foster*, 1 Mass. 145, 2 Am. Dec. 6.

**Section 2522. Rights of Children Unprovided for by Will:**

When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding Section.

1887 R. S. Sec. 5744.

**CHILDREN UNPROVIDED FOR:** Where a testator omits to provide in his will for one of his children, unless it appears that the omission was intentional, the child succeeds to the same portion of the estate of the testator as he would have received if the testator had died intestate.—*Smith v. Olmstead*, 88 Cal. 582, 26 Pac. 521, 12 L. R. A. 46. A devise of specified land in a certain county to designated grand-

children is such a provision for such grandchildren as will prevent their taking the same share in the estate as if testatrix had died intestate, although she had no land in such county at the time of making the will.—*In re Estate of Callaghan*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689; *Negus v. Negus*, 46 Iowa, 487, 26 Am. Rep. 157; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164.

**Section 2523. Share of Afterborn Child, how Selected:**

When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or to the issue of

a child omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that it not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specifics devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

1887 R. S. Sec. 5745.

**Section 2524. Advancements During Life of Testator:** If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding Sections.

1887 R. S. Sec. 5746.

**ADVANCEMENTS:** Certain bequests held to be cumulative legacies and not advancements within the

meaning of that term as used in the statutes.—*In re Zeile*, 74 Cal. 125, 15 Pac. 455.

**Section 2525. Lineal Descendants of Devisee Take His Share:** When any estate is devised to any child or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done, had he survived the testator.

1887 R. S. Sec. 5747.

The wife is not a "relative" within the meaning of a statute providing that when any estate shall be devised to any child, grandchild or other relative of the testator and such devisee

shall die before the testator leaving lineal descendants, such descendants shall take the estate as such devisee would have done had he survived.—*In re Benton's Estate*, 10 Wash. 533, 39 Pac. 145.

**Section 2526. What Devisee Conveys:** Every devise of land in any will conveys all the estate of the deviser therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

1887 R. S. Sec. 5748.

**DEVISING ALL ONE'S ESTATE:** A direction by a testator in his will that his wife shall have and hold the property where he resides will carry to her the fee in such property.—*Snider v. Baer*, 144 Pa. 278, 13 L. R. A. 359, 22 Atl. 897. A will operates upon so much of the land as legally and equitably

belongs to the testator at the time of his death.—*Bruck v. Tucker*, 32 Cal. 426. A testator will be presumed to have intended to dispose of his whole estate.—*Whitcomb v. Rodman*, 156 Ill. 116, 28 L. R. A. 149, 40 N. E. 553; *Barnes v. Boardman*, 149 Mass. 106, 3 L. R. A. 785, 21 N. E. 308.

**Section 2527. Will Passes After Acquired Estates:** Any estate, right or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if the title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms devising, or in any other terms denoting the intent of the testator to devise all the



real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

1887 R. S. Sec. 5749.

**AFTER-ACQUIRED ESTATE:** After-acquired estates will pass where the will shows an intent not to die intestate and to exclude the heirs, except as they were given legacies.—App. of Jacobs, 140 Pa. 268, 11 L. R. A. 767,

21 Atl. 318; Wynne v. Wynne, 58 Am. Dec. 66; Morgan v. Huggins, 42 Fed. 869, 9 L. R. A. 540; In re Estate of Hopper, 4 Pac. 984; contra, Webster v. Wiggins, 19 R. I. 73, 28 L. R. A. 510, 31 Atl. 824.

**Section 2528. Restrictions on Power to Devise to Charitable Uses:** No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them shall be valid: *Provided*, That no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving lineal descendants, and in such case, a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee next of kin, or heirs, according to law.

1887 R. S. Sec. 5750.

**Section 2529. Property of Intestate Chargeable with Debts:** When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in these Codes

1887 R. S. Sec. 5751.

**Section 2530. Order of Resort to Property for Payment of Debts:** The property of a testator, except as otherwise especially provided for in these Codes must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specially devised or bequeathed; and,
5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for.

1887 R. S. Sec. 5752.

Debts must be paid out of the property especially appointed by will for

the payment of debts.—In re Heydenfeldt's Estate, 106 Cal. 434, 39 Pac. 788.

**Section 2531. How Resorted to in Payment of Legacies:** The property of a testator, except as otherwise specially provided for in these Codes, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed.

1887 R. S. Sec. 5753.

Legacies must be paid out of the property directed by the will.—*Mackay v. Mackay*, 107 Cal. 303, 40 Pac. 558.

Property specifically devised or bequeathed cannot be charged with the payment of general legacies.—*Estate of Neistrath*, 66 Cal. 330, 5 Pac. 507.

**Section 2532. Legacies to Kindred, when Chargeable:** Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

1887 R. S. Sec. 5754.

**Section 2533. Specific Devises, when Title Passes:** In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the judge of the probate court to sell the property devised and bequeathed, in the cases herein provided.

1887 R. S. Sec. 5755.

Legacies vest as of the death of the

testator.—*In re Estate of Pearson*, 113 Cal. 577, 45 Pac. 849 and 1062.

**Section 2534. Legacies, when Due. Annuities:** Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

1887 R. S. Sec. 5756.

**LEGACIES:** Where a will provides that executors shall not be required to pay legacies until such time as it may be practicable to do so, having regard to beneficial management of the estate, the legacies become due, without regard to such provision, at the end of

one year after the testator's death.—*In re Williams' Estate*, 112 Cal. 521, 44 Pac. 808. But see *Estate of James*, 2 Pac. 494.

**ANNUITIES:** Annuities commence at the date of testator's decease.—*Crow v. Pratt*, 119 Cal. 131, 51 Pac. 44.

**Section 2535. Executor not to Act Until Qualified:** No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

1887 R. S. Sec. 5757.

**Section 2536. Interpretation of Wills, what Law Governs:** Except as otherwise provided, the validity and interpretation of wills are governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicile.

1887 R. S. Sec. 5760.

**LAW OF WHAT PLACE GOVERNS:** The disposition of personal property is governed by the domicile of the owner, and if valid there, may be enforced in another state, though not valid in such state.—*Whitney v. Dodge*, 105 Cal. 192, 38 Pac. 636; *Gilman v. Gilman*, 52 Me. 165, 83 Am. Dec. 502; *Ma-*

*horner v. Hooe*, 48 Am. Dec. 706; *McCune v. House*, 8 Ohio, 144, 31 Am. Dec. 438; *Montgomery v. Millikin*, 43 Am. Dec. 507. The validity of a devise of real property depends upon the law of the place where it is situated.—*Hawley v. James*, 32 Am. Dec. 623; *Wynne v. Wynne*, 23 Miss. 251, 57 Am. Dec. 139.



## CHAPTER CIV.

## SUCCESSION.

## Section.

- 2537. Succession defined.
- 2538. Property of intestate, to whom passes.
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- 2543. Advancements constitute part of distributive share.
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- 2547. Where heir advanced to dies before decedent.
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**Section 2537. Succession Defined:** Succession is the coming in of another to take the property of one who dies without disposing of it by will.

1887 R. S. Sec. 5700.

Where children are born after making will: See Sec. 2521, this Code.

**Section 2538. Property of Intestate, to whom Passes:** The property both real and personal, of one who dies, without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration.

1887 R. S. Sec. 5701.

**Section 2539. Order of Succession:** When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in these Codes, subject to the payment of his debts, in the following manner:

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leave issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children

living, or to the child living, and the issue of the deceased child or children by right of representation.

2. If the decedent leave no issue, the estate goes, one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other.

3. If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

4. If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother or sister, the whole estate goes to the surviving husband or wife.

5. If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancestor more remote.

6. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

7. If at the death of such child, who dies under age, not having been married, all the other children of his parents, are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issues are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

8. If the decedent be a widow or widower, and leave no kindred, and the estate, or any portion thereof, was common property of such decedent, and his or her deceased spouse, while such spouse was living, such common property shall go to the father of such deceased spouse, or if he be dead, to the mother. If there be no father nor mother, then such property shall go to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse, by right of representation.

9. If the decedent leave no husband, wife, nor kindred, and there be no heirs to take his estate, or any portion thereof, under sub-divis-



ion eight of this section, the same shall be paid into the state treasury for the support of common schools.

1887 R. S. Sec. 5702.

**WHAT ARE DEBTS:** Where money was appropriated by the decedent, a claim therefor on his estate in the hands of his heirs must be first satisfied out of his personal estate.—*Whitesett v. Kershow*, 4 Colo. 419. Persons in possession of land, claiming as heirs at law, are not personally liable for rents and profits received by their ancestor, in the absence of evidence that the same came into their possession.—*Noble v. Douglass* (Kan.), 42 Pac. 328, and heirs at law are not liable for damages for use and occupancy during the life of their ancestor.—*Hillyer v. Douglass* (Kan.), 42 Pac. 329; but when after all the assets of a warrantor dying intestate have been converted into money and distributed to the heirs, a breach of the warranty occurs, the heirs may be compelled to refund so much of what they received as shall satisfy the damage.—*Rohrbaugh v. Hamblin* (Kan.), 46 Pac. 705.

Subdiv. 1. Where a woman had repeatedly declared herself married to a second husband and they had lived and cohabited together and held themselves out to the public as man and wife prior to the death of the first husband, she was debarred from claiming as the widow of her first husband.—*Israel v. Arthur* (Colo.), 32 Pac. 68.

Under this subdivision, the word "issue" is used in the same sense as "child," and the section of the Code relating to the status of adopted children when construed with this section, will entitle an adopted child to succeed to the estate of the adopting parent.—*In re Newman's Estate* (Cal.), 16 Pac. 887.

Subdiv. 2. This subdivision enacting

that the children of a deceased brother or sister of the intestate shall take their parents' share, applies only to cases in which there is a surviving brother or sister.—*Ingram's Estate v. Clough* (Cal.), 21 Pac. 435.

Subdiv. 5. A surviving husband of an intestate wife who left no issue, nor any of the relations mentioned in the subdivision, is her sole distributee, though the children and grandchildren of a deceased sister of the intestate survive her. Subdivision 2 of this section, enacting that the deceased brother or sister of the intestate shall take their parents' share, applies only to cases in which there is a surviving brother or sister.—*Ingram's Estate v. Clough* (Cal.), 21 Pac. 435. Under a similar section taken in conjunction with a statute providing that "Degrees of kindred shall be computed according to the rules of the civil law" (See Sec. 2542, this Code), the real estate of such an intestate was held to descend to his grandfather, in preference to an uncle. *Smallman v. Powell* (Or.), 23 Pac. 249. Under the same section, the estate of such an intestate was held to descend to his grandmother on his father's side and to his grandfather and grandmother on his mother's side, in equal shares.—*Shadden v. Hembree* (Or.), 18 Pac. 572.

Subdiv. 6. Under this subdivision and Section 1394 (2542, this Code), where a decedent inherited his estate from his father, the sisters and brothers of his deceased mother shared equally with those of his father.—*In re Pearsons' Estate*, 110 Cal. 524, 42 Pac. 960.

### **Section 2540. Illegitimate Child, when to Inherit:**

Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock, but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child or adopts him into his family; in which case, such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate and without issue, the others inherit his estate and are heirs as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother respectively, their rights in the estates of all the children in like

manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

1887 R. S. Sec. 5703.

**WHAT WRITING NECESSARY:** Where a putative father wrote to his child and signed letters in the presence of a competent witness, addressing her as "My darling child" and signing himself "From your loving father," and also wrote her grandfather with reference to having her baptized and christened with his name, and relative to her religious instruction, such acts amount to a complete acknowledgment under this section and it was not necessary that the witness should have subscribed the letters.—*Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915.

**POLYGAMOUS CHILDREN:** Held, that a similar provision permitting illegitimate children to inherit from the father is not in conflict with the Act of Cong. of July 1, 1862, annulling all acts passed by the Utah legislature

which establish support, maintain, or countenance polygamy, and all children acknowledged, whether legitimate or polygamous may inherit by the section.—*In re Pratt's Estate* (Utah), 26 Pac. 576.

**COMITY:** Under a Pennsylvania statute a child born out of wedlock is rendered legitimate by the subsequent marriage and cohabitation of its parents and being legitimate there, is legitimate in New Jersey and may inherit land there.—*Dayton v. Adkinson* (N. J.), 4 L. R. A. 488, 17 Atl. 964.

**INHERITANCE FROM:** The next of kin of the father of an illegitimate child that has been adopted with capacity to inherit, but not legitimated, have no inheritable blood as to such child.—*Murphy v. Portrum* (Tenn.), 30 L. R. A. 263, 32 S. W. 623.

**Section 2541. Mother is Successor to Illegitimate Child without Issue:** If an illegitimate child who has not been acknowledged or adopted by his father, dies intestate without lawful issue, his estate goes to his mother, or in case of her decease, to her heirs at law.

1887 R. S. Sec. 5704.

A statute providing that "bastards shall be capable of inheriting and transmitting on the part of or to the mother" does not provide for the trans-

mission of the estate through the mother to her collateral kindred.—*Croan v. Phelps* (Ky.), 23 L. R. A. 753, 21 S. W. 874.

**Section 2542. Degrees of Kindred, how Computed:** The degrees of kindred are computed according to the rules of the civil law. Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

1887 R. S. Sec. 5705.

**CHILDREN OF THE HALF BLOOD:** Where a husband dies intestate, having children by three wives, one-half of the estate goes by statute to his widow in fee and, on her death, her estate descends to her own children and the statute providing that children of the half blood shall inherit equally with children of the whole blood does not affect the descent, since the third wife is not related by blood to the children of the former wives and the statute providing that the children of a deceased parent inherit in equal proportions the portion which their

father or mother would have inherited if living (c. f. Sec. 255, this Code), does not apply.—*Carlton v. Burleigh* (Kan.), 34 Pac. 1050. Under this section and subdivision 6 of Section 1386 (Subdiv. 6, Section 2539, this Code), where a deceased inherited his estate from his father, the sisters and brothers of his deceased mother shared equally with those of his father.—*In re Pearson's Estate*, 110 Cal. 524, 42 Pac. 960. Under a similar section, it was held that children of a deceased's husband by a former wife cannot inherit from deceased an estate acquired by descent.—*Amy v. Amy* (Utah), 42 Pac. 1121.

**Section 2543. Advancements Constitute Part of Distributive Share:** Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child or other lineal



descendant, is a part of the estate of the decedent for the purpose of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, toward his share of the estate of the decedent.

1887 R. S. Sec. 5706.

See notes under two following sections.

**Section 2544. Advancements, Right of Heir Receiving the Same:** If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

1887 R. S. Sec. 5707.

**RISE IN VALUE:** A purchase of land by a parent in the name of a child may be an advancement, but only to the extent to the price actually paid by the father, without regard to any subsequent rise in the value of the land.—*Phillips v. Gregg*, 36 Am. Dec. 158.

**RESIDUUM:** An advancement to a son in full of all claims against the estate of his father, will not, after his death, prevent the son from taking as heir, a residuum not disposed of by will.—*Needles v. Needles*, 70 Am. Dec. 85.

**Section 2545. Advancements, what are:** All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir.

1887 R. S. Sec. 5708.

Where J., an executor and legatee who received moneys of the estate, died and W., surviving executor, presented no claims against his estate for the same, the court cannot, on the death of W., after the time for presenting claims against the estate of J. had expired, deduct upon distribution, the amount collected by J. out of the share due his estate. For the sums were not an advancement to J.—*In re Smith's Estate*, 108 Cal. 115, 40 Pac. 1037; but where the administrator advances a sum of money to the widow

of his intestate out of the funds of the estate, he may be reimbursed for such amount, on the settlement of his accounts, from the distributive share due such widow, whether it consists of money or real estate.—*In re Moore's Estate*, 96 Cal. 522, 31 Pac. 384. The declaration of a parent of intention to treat an existing debt due from a child thereof as an advancement, will not produce this effect when not agreed to by the child, nor accompanied by an act obliterating the obligation as a debt.—*Yundt's Appeal* (Pa.), 53 Am. Dec. 496.

**Section 2546. Ascertaining Value of Advancement:** If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise it must be estimated according to its value when given, as nearly as the same can be ascertained.

1887 R. S. Sec. 5709.

See note under Sec. 2544.

**Section 2547. Where Heir Advanced to Dies Before Decedent:** If any child or other lineal descendant receiving advancement dies before the decedent, leaving issue, the advancement

must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

1887 R. S. Sec. 5710.

**Section 2548. Inheritance of Husband and wife from each Other:** The provisions of the preceding sections of this chapter, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents.

1887 R. S. Sec. 5711.

**RIGHTS OF SURVIVING HUSBAND:** The fact that there was no administration of the wife's estate un-

til after her husband's death does not deprive his estate of his right as heir.-- In re Dobbel's Estate, 104 Cal. 432, 38 Pac. 87.

**Section 2549. Distribution of Community Property on Death of Wife:** Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

1887 R. S. Sec. 5712; 1879 10th Ses. p. 50, Sec. 1, 1st part.

**Section 2550. Distribution of Community Property on Death of Husband:** Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

1887 R. S. Sec. 5713; 1879 10th Ses. p. 50, Sec. 1, 2d part.

**Section 2551. Inheritance by Right of Representation:** Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

1887 R. S. Sec. 5714.

**REPRESENTATION:** No part of the assets of a deceased person will pass by representation to those claim-

ing through a pre-deceased child, where by law, such parent was the child's sole heir.—Gray v. Holmes (Kan.), 33 L. R. A. 307, 45 Pac. 596.

**Section 2552. Aliens may Inherit, when and how:** Resident aliens may take in all cases, by succession as citizens; and no person capable of succeeding under the provisions of this chapter



is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner, can take, by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

1887 R. S. Sec. 5715.

**EFFECT OF THE STATUTE:** When a state makes aliens capable of taking lands by descent, within its own territory, it by no means makes them citizens of the United States, nor does it give them any capacity to take by descent, or in any other capacity whatever in any other state, each state having the undoubted right to regulate the law of descents within its own limits.—*Montgomery v. Dorion*, 7 N. H. 435.

**ESCHEAT:** A non-resident foreigner cannot take real estate by succession under the provisions of this section unless he appears and claims succession within five years after the death of the decedent, and if succession is not claimed within that period, the real estate owned by the deceased escheats to the state to be disposed of as provided in the following section.—*State v. Stevenson* (Idaho), 55 Pac. 886.

**Section 2553. Proceedings when Succession is not Claimed:** When succession is not claimed as provided in the preceding section, the district court, on information, must direct the attorney general to reduce the property to his or the possession of the state, or to cause the same to be sold, and the same, or the proceeds thereof, to be deposited in the state treasury for the benefit of such non-resident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the state auditor and state treasurer is produced that he is entitled to succeed thereto.

1887 R. S. Sec. 5716.

**ESCHEAT:** Title by escheat passes

to the state by operation of law.—*State v. Stevenson* (Idaho), 55 Pac. 886.

**Section 2554. Record of Property Claimed. When Estate Goes to School Fund:** When so claimed, the evidence and the joint order of the auditor and treasurer, must be filed by the treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent is placed by the state treasurer to the credit of the school fund.

1887 R. E. Sec. 5717.

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## WHO MAY TAKE, HOLD AND DISPOSE OF.

**Section 2555. Any Person Except Chinese May Take and Hold:** Any person, whether citizen or alien, (except as hereinafter provided) natural or artificial, may take, hold and dispose of mining claims and mining property, real or personal, tunnel rights, mill sites, quartz mills and reduction works used or necessary or proper for the reduction of ores, and water rights used for mining or milling purposes, and any other lands or property necessary for the working of mines or the reduction of the products thereof: *Provided*, That Chinese, or persons of Mongolian descent not born in the United States, are not permitted to acquire title to land or any real property under the provisions of this title.

1899 5th Ses. p. 71, Sec. 2; 1891 1st Ses. p. 118, Sec. 1.

**OWNERSHIP AND ADVERSE CLAIMS:** Mining property acquired in this state under the laws of the United States during coverture is community property. Under the laws of Idaho territory as they existed in July, 1886, all property acquired by the husband in said territory during coverture, except such as was acquired by gift, bequest, devise, or descent, was community property, and this, although the wife may never have been a resident of the territory.—*Jacobson v. Bunker Hill & Sullivan Mining Co.* 2 Idaho, 863, 28 Pac. 396. In proceedings under Rev. St. U. S. Secs. 2325, 2326, to determine the rights of adverse claimants to mineral locations, where the complaint is open to the objection that it states two causes of action, one legal and one equitable, and the defendant does not challenge the complaint by motion or otherwise, but assents to calling a jury, and proceeds to trial as in an action at law, and both parties adduce their evidence on the questions of fact involved, it is then too late for the defendants to move to have the case declared a proceeding in equity, and to have it decided as such without the intervention of a jury. So far as the form of action is concerned, it makes no difference

who is in or out of possession. The proceeding is simply to determine which party, if either, is entitled to a patent and in such case, where the claim is asserted under a location, actual possession is not a material question. *Buck, J. dissenting.—Burke v. McDonald*, 2 Idaho, 310, 13 Pac. 351. In an action to decide an adverse claim to a mining claim, a verdict simply finding that the plaintiffs are entitled to possession, and which does not allege that they have such right by reason of compliance with the absolute requirements of the law, or that they have it as against the government as well as against the defendants, is bad and will operate to reverse a judgement based thereon, since the Act of Congress of March 3, 1881, provided that if no title to the ground in controversy be established by either party, the jury shall so find.—*Burke v. McDonald*, 2 Idaho, 646, 13 Pac. 351.

**CONTRACTS FOR SALE:** The rule that time is of the essence is especially applicable to contracts for the purchase and sale of mining properties.—*Durant v. Comegys*, 2 Idaho, 936, 28 Pac. 425.

**MINING LEASE:** In an action to reform a mining lease by including in it certain ground alleged to have been



omitted by mistake, it appeared that the lessors desired to limit the area of the lease that the ground was suggested by A., one of the lessees, as the limit; that a lease was written out and handed to the lessees who kept it for a week; that it was then altered in some minor details; that A. was familiar with the premises and it was held that the evidence was not sufficient to warrant a reformation.—*Houser v. Austin*, 2 Idaho, 188, 10 Pac. 37. In such case, an instruction that, "if the jury find that the lessors told the lessees that the lease extended to the ground in dispute, and the lessees, so believing, went to work therein with the knowledge of the lessors, and the lessors received a royalty from the ore sold therefrom, then the lessors should be estopped from claiming that the lease did not include the land in dispute," is error, in that it fails to state that the party to be estopped must have had knowledge that his representations were false and that the party claiming the benefit of the estoppel was ignorant of the truth, and honestly acted on the statement.—*Id.* Construction of lease and option for purchase; effect of payment and part performance and offer to pay after expiration of time.—*Settle v. Winters*, 2 Idaho, 199, 10 Pac. 216. Prior to the act of Congress of March 3, 1887, known as the "Alien Act," there was nothing in the laws of the United States, nor of the Territory of Idaho, prohibiting aliens from holding and working mining ground under lease from one qualified, and who had made a proper location of such mining ground.—*Ah Kle et al. v. McLean et al.* 32 Pac. 200 (Idaho.)

**ALIENS:** Prior to the Act of Congress of March 3, 1887, known as the "Alien Act," there was nothing in the laws of the United States nor of the Territory of Idaho, prohibiting aliens from holding and working mining ground under lease from one qualified and who had made a proper location of said mining ground.—*Ah Kle v. McLean* (Idaho), 32 Pac. 200. Under the Rev. St. U. S. Sec. 2319, declaring mineral deposits on public lands open to exploration and purchase by citizens, an alien cannot take and hold the possessory title to an unpatented claim which has been conveyed to him by a citizen as against another citizen who has subsequently located and demands possession of such claim, and such conveyance restores the claim to the public domain and authorizes its relocation.—*Galbraith, J. dissenting.*—*Tibbits v. Ah Tong*, 4 Mont. 548, 2 Pac. 759,

768. But this case cites *Ferguson v. Neville*, 61 Cal. 356, which is in accord with the dissenting opinion and holds that aliens, bona fide residents, cannot locate but may purchase mining claims properly located, and they can only be dispossessed by the state after "office found," and that they can also convey the title, and the claims acquired by resident aliens are not open to relocation. S. Dak. is in accord with the latter case.—*Gorman Min. Co. v. Alexander*, 2 S. Dak. 566, 51 N. W. 346. Under Rev. St. U. S. Sec. 2319, providing that all mineral deposits on public lands shall be free and open to exploration and purchase in the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intention to become such, one who is not a citizen and has not declared his intention to become such, acquires no right by posting a notice of claim.—*Anthony v. Jillson* (Cal.), 23 Pac. 415, Rev. St. U. S. Secs. 2319, 2321, 2325. A corporation, all of whose members are citizens of the United States, is competent to locate a mining claim.—*Thomas v. Chisholm* (Colo.), 21 Pac. 1019. Under the Act of Congress of May 10, 1872, only citizens of the United States and persons who have declared their intention to become such, can acquire any right of possession by location or otherwise, of mineral lands on the public domain. And in an action for trespass upon mining ground and for damages where the legal title to the ground is in the United States, and the right of possession is made by the pleadings a material issue, the plaintiff in order to recover, must plead and prove that he is a citizen of the United States or that he has declared his intention to become such.—*Bohanon v. Howe*, 2 Idaho, 417; c. f. *Ferguson v. Ah Tong*, supra. So, in an action to determine the right of possession to a mining claim, the failure of the court to find as to citizenship of the party for whom judgment was rendered is error, even though the citizenship of such party is limited by the pleading.—*Rosenthal v. Ives*, 2 Idaho, 244, 12 Pac. 904. The naturalization of an alien during trial will not retroact so as to validate his claim.—*Wulff v. Manuel* (Mont.), 23 Pac. 723. Proof of birth within the United States is sufficient to establish the citizenship of one setting up a claim to mineral lands in the absence of a showing of subjection to a foreign power.—*Thompson v. Spray* (Cal.), 14 Pac. 182.

## LOCATION OF LODE MINING CLAIMS.

**Section 2556 Width of Claim. Marking Lines, Effect of:** Mining claims hereafter located upon veins or lodes of quartz, or other rock in place bearing any of the metals or other valuable deposits mentioned in section 2320 of the Revised Statutes of the United States, may extend to three hundred feet on each side of the middle of the vein or lode: *Provided*, That when the locators have set stakes, posts or monuments described in section 2557 of this chapter, to indicate the line of the vein, ledge or lode, such stakes, posts or monuments must be taken for the purpose of such location, to mark correctly the line thereof, and such line must not afterwards be changed so as to affect rights acquired or interfere with any locations made subsequent thereto.

1899 5th Ses. p. 237; 1895 3d Ses. p. 25, Sec. 1, amending laws 1887 R. S. Sec. 3100; 1881 11th Ses. p. 262, Sec. 1.

**LODES AND VEINS:** Though to constitute a vein, it is not required that well defined walls be developed or paying ore found within them, there must be rock, clay or earth, so colored or decomposed by the mineral elements as to mark and distinguish it from the inclosing country.—*Burke v. McDonald* (Idaho), 33 Pac. 49. A "lode" or "vein" within the meaning of those terms as used in the mining acts, is that which is so called by miners.—*Harrington v. Chambers* (Utah), 1 Pac. 362. The word "lode" is properly defined as a "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock," and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be within defined boundaries.—*Gregory v. Pershaker* (Cal.), 14 Pac. 401.

**MINING REGULATIONS AND CUSTOMS:** Where a mining regulation is shown to have existed, such regulation is presumed so to exist until the contrary appears.—*Riborado v. Quang Pang Mining Co.* 2 Idaho, 131, 6 Pac. 125.

**BOUNDARIES:** The testimony of an engineer who surveyed the defendants' mining claim, that a certain compromise monument was pointed out to him by the parties who then claimed the ground, established by them for the mere purpose of showing where they understood the location to be, and that he referred to such monument only to show how and in what manner he had made the survey, was admissible, no attempt being made to establish the boundary by means of such parcel compromise.—*Stem-Winder Mining Co. v. Emma & Last Chance Mining Co.* 2 Idaho, 421, 21 Pac. 1040. In a case involving a question of conflicting bound-

daries between plaintiff's and defendants' mines, defendants' measurements being claimed to be excessive and void, the decision of which would determine whose location was prior in charging the jury that, "there is really but one question in this case, and that is, who first made a valid location on this ground?"—*Id.* From the time that a lawful location of a quartz claim has been made, being a space of two hundred feet in length, and fifty feet on each side of the stakes, the claimant becomes the owner as against any other claimant, of the soil embraced in those limits.—*Atkins v. Hendree*, 1 Idaho, 95. The mere fact that in marking the boundaries of their location, the defendants' grantors set their stakes more than 1500 feet in length and 600 feet in width does not invalidate the location, except as to the excess, where such excessive measurements were made by mistake and without fraud, and were duly corrected before the rights of third parties attached.—*Stem Winder Mining Co. v. Emma & Last Chance Mining Co.* *supra*. Easterly of the discovery point the M. claim was marked 150 feet longer than the calls of the notice, and was wider than allowed by law, but the westerly 1000 feet was marked substantially correct in size. Held that where the ground was of such a character that accuracy of measurement was very difficult, and the L. claim was discovered and located mostly on the westerly end of the M., where the latter was correctly marked, the location of the L. would not be deemed to have been misled by the inaccurate marking of the M., and the M. was not void for inaccuracy of boundaries.—*Burke v. McDonald* (Idaho), 33 Pac. 49. It is immaterial that the lines and monuments of the official survey of a mining claim are not identical with those of the original location, the location being void only in so far as it exceeds the statutory requirements.



—Howeth v. Sullenger, 113 Cal. 547, 45 Pac. 841.

Rev. St. U. S. Sec. 2322, provides that the owners of mining claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extend downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular from their course downward as to extend outside of the vertical side lines of such surface locations." Held, that an owner of a mining claim has no right to follow a vein into an adjoining claim unless such vein has its apex within its own side lines.—Gilpin v. Sierra Nevada Consolidated Mining Co. 2 Idaho, 662, 23 Pac. 547, 1014.

On a bill to enjoin an adjoining owner from working a vein on the plaintiff's claim, the defendant alleged that such vein had its apex on his claim. Defendant's claim adjoined plaintiff's claim on the east of the latter; and it appeared that the plaintiff sank a shaft near his eastern line in ledge matter consisting of various substances, including some ore. Following the dip of the ledge matter, and deflecting to the south about 150 feet, he struck the defendant's underground workings, finding some ore before doing so. The ledge matter was continuous. The defendant's ore was of a kind sometimes found in "blanket veins," without apices or dips, and, it

was doubtful if the vein was a fissure vein. The dip was nearly at right angles with the north side of the plaintiff's claim, and deflected little, if at all, from the lead of the defendant's ledge. The true average dip of a vein is always at right angles to the lead. All the defendant's tunnels were on the bed-rock or floor of the ore deposits, rose slightly as they receded from their mouths on the defendant's claim, were at right angles with a line formed by their mouths, and pursued an almost due westerly course. The mouths were at an outcrop of a deposit, nearly horizontal in position, on a mountain side. The dip of the floor of the ore deposits was from north to south. Held, that it was not shown that the apex of the vein was on the defendant's claim, and hence the defendant had no right to extend its works into and extract ore from the plaintiff's claim.—Gilpin v. Sierra Nevada Consolidated Mining Co. *supra*. Held also, that an injunction would lie to restrain continuance of the unlawful removal of ore from the plaintiff's mine, whether or not the injury, if consummated, would be irreparable.—Id.

The claimant is allowed to hold but one ledge by location, but the fact that other ledges may exist within those limits must first be established before a subsequent claimant has any lawful right to pass into those boundaries which otherwise must be sacred to the first location.—Atkins v. Hendree, 1 Idaho, 95; but see Gilpin v. Sierra Nevada Consolidated Mining Co. *supra*.

**Section 2557. Time and Manner of Making Location:** The locator, at the time of making the discovery of such vein or lode, must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery and distance claimed along the vein each way from such monument. Within ten days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument, marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument, to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim, and seventh, the name of the mining district, county and state. When from any cause, a monument can

not be safely planted at the true corner or angle, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing towards the discovery, and must be at least four inches square or in diameter. Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim, he may do so in any direction that will not interfere with rights or claims which existed prior to his discovery.

1889 5th Ses. p. 440; 1899, 5th Ses. p. 237. 1895, 3d Ses. p. 26, Sec. 2, amending laws of 1887 R. S. Sec. 3101; 1881, 11th Ses. p. 263, Sec. 2.

**WHAT LANDS OPEN TO LOCATION:** Where parties in possession and those under whom they held had worked the ground for a period of nearly thirty years, the land having been located in 1862, other parties can not come in and claim the ground by location of the premises under the laws of the United States.—*Ah Kle v. Gregory* (Idaho), 34 Pac. 812. The fact that land on which the discovery and location of a mining claim are made is within the patent limits of a town, will not affect the title of the locator, where it was known prior to the patent to the town that a mineral vein existed where the discovery and location were made.—*Moyle v. Bullene* (Colo.), 44 Pac. 69.

**LOCATION BY AGENT:** Where the complaint alleges that a mining claim was located on behalf of the owner by a duly authorized agent, and the answer admits the fact, it is error for the court to refuse to give an instruction to the effect that one might initiate the location of a mining claim through an agent.—*Schultz v. Keeler*, 2 Idaho, 532, 21 Pac. 418. The law implies an authority in one person to locate a mining claim in the name of another from the fact of making such location; and it is error to instruct that some express authority is necessary.—*Rush v. Frech* (Ariz.), 25 Pac. 816. Under Rev. St. U. S. Sec. 2322, vesting in the locator of a mining claim the exclusive right to its possession, a location of a mining claim may be made by one person in the name of another.—*Moore v. Hammerslag* (Cal.), 41 Pac. 805. One may locate a mining lode on the public domain by his agent.—*Murley v. Ennis*, 2 Colo. 300.

**TIME:** Where a discovery is made by a prospector, of such a character as to entitle him to make a valid location on the 16th of September and he sets his discovery stake on that day, partially stakes and marks his claim on the 17th, and completes his staking and

marking of boundaries according to law on the 18th, his discovery and location will date from the 16th of September.—*Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98, but a discovery after location of a mining claim which is void for want of previous discovery, can not relate back and make such location valid.—*Upton v. Larkin* (Mont.), 6 Pac. 66; however, one in possession of a claim, under such circumstances, can hold possession of the surface as against one possessing or claiming no better right.—*Field v. Gray* (Ariz.), 25 Pac. 793.

**DISCOVERY:** A valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral as he is willing to spend his time and money in following with the expectation of finding ore, is a proper instruction, and changing the word "willing" to "justified," radically changes the instruction and is an improper modification.—*Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98. At the time of a mining location, the measurement must be from the point of discovery (the middle of the point of discovery), unless there is evidence that the vein had been actually established and run, but if the evidence is simply that there is a point of discovery, then the only knowledge one can have of the vein is of that part which crops out at the point of discovery, and the parties must be entitled to 300 feet on each side of the middle of the vein at the point of discovery.—*Stem Winder Mining Co. v. Emma and Last Chance Consolidated Mining Co.* 2 Idaho, 421, 21 Pac. 1040. The location is void when its discovery is placed within an existing valid claim.—*Watson v. Mayberry* (Utah), 49 Pac. 479. Similarly, to constitute a valid location of a lode, the discovery of the vein or lode of mineral bearing rock must be within the limits of the claim.—*Michael v. Mills* (Colo.), 45 Pac. 429; but it is not required that the paying mineral necessary to justify the location of the claim should be found at the time and place of the discovery,



but it is sufficient if the vein shows that paying mineral exists within the limits of the location.—*McShane v. Kenkle* (Mont.), 44 Pac. 979. A location cannot be made by virtue of a shaft sunk on the patented claim of another person.—*Upton v. Larkin* (Mont.), 3 Pac. 66, but a discovery will sustain a valid location, although a portion of the discovery shaft is upon an adjoining located claim.—*Upton v. Larkin* (Mont.), 17 Pac. 728.

**MONUMENTS:** In locating mining claims, it has become the settled law that Section 2324 of the Rev. St. U. S. must be complied with. The record must contain such a description of the claim by reference to some natural object or permanent monument as will identify the claim and such reference must be such as to furnish a reasonable certainty that the locus of the claim could not well be changed. Permanent monuments may be erected for the purpose of tying claims to

them.—*Brown v. Levan* (Idaho), 46 Pac. 661. Under Rev. St. U. S. Sec. 2324, requiring reference to some "natural object" in a description of a mining claim, a tree is such a natural object if it is marked or if it possesses peculiarities by which it can be designated.—*Quimby v. Boyd* (Colo.), 6 Pac. 462; a creek may be such a monument.—*Carter v. Bacigalupi* (Cal.), 23 Pac. 361; a large boulder may be such an object.—*Gamer v. Glenn* (Mont.), 20 Pac. 654; likewise the courses of two mountain peaks.—*Craig v. Thompson* (Colo.), 16 Pac. 24. Trees blazed and squared, rock monuments and the prospect hole are permanent objects within the meaning of Rev. St. U. S. Sec. 2324.—*Hanson v. Fletcher* (Utah), 37 Pac. 480; and trees cut off about three feet from the ground and blazed and squared will answer as stakes.—*Id. Clearwater S. L. Ry. Co. vs. San Garde et al.*, 61 Pac. 137.

### **Section 2558. Work Necessary to Constitute Valid**

**Location:** Within sixty days after such location, the locator or his assigns, must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft and which shall measure one hundred and sixty cubic feet in extent shall be considered a compliance with this provision. Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to re-location for a period of ninety days from and after the date of location.

1899, 5th Ses. p. 238, Sec. 3; 1895, 3d Ses. p. 27, Sec. 3.

The work to be done must be performed within the time limited by the statute as a condition precedent, be-

fore the title can vest under the provisions of Section 6 (Sec. 3 of Fifth Sess. Page 238).—*Kramer v. Settle*, 1 Idaho, 485.

### **Section 2559. When Notice of Location Must be**

**Filed:** Within ninety days after the location of the claim, the locator or his assigns must file for record in the office of the county recorder of the county or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location.

1899, 5th Ses. p. 238, Sec. 4; 1895, 3d Ses. p. 27, Sec. 4.

Where notice to be filed, fees: Sec. 2568.

**PRESUMPTION OF CONSENT:** If one of several co-locators of a mining claim caused a notice of location of a mining claim to be recorded in the name of himself and his co-locators, in the absence of proof to the contrary, it will be presumed that the written consent of such co-locators had been seen, and a minute made thereof by the recorder, before recording such notice.—

*Kramer v. Settle*, 1 Idaho, 485.

**ERROR IN RECORD** A certificate of location being made in compliance with the statute, an error in recording will not invalidate the location.—*Weise v. Barker* (Colo.), 2 Pac. 919.

**TIME** Failure to record a location within three months from the date of discovery as required by the statute, does not inure to the benefit of the owners of an overlapping claim, originating from a junior discovery, who made no attempt to relocate the claim.—*Omar v. Soper* (Colo.), 18 Pac. 443.

**Section 2560. Location of Abandoned Claims:** The location of abandoned claims shall be done in the same manner as if the location were of a new claim; but the locator may, instead of sinking a new discovery shaft, sink the original discovery shaft ten feet deeper than it was at the time of his location, or he may drive the open cut, or tunnel ten feet further along the course of the lead, lode or vein, and must erect new posts or monuments.

1899, 5th Ses. p. 239, Sec. 7; 1895, 3d Ses. p. 28, Sec. 7.

**RELOCATION BY AGENT:** A person sustaining a fiduciary relation in respect to a mining claim can not defeat the rights of his principal by relocating it for himself. If he does so locate and benefit accrues from such relocation, the benefit accrues to the owner and not to the relocater.—*Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413.

**WHAT CONSTITUTES ABANDONMENT:** Under Rev. St. U. S. Sec. 2324, providing that, on failure to comply with the conditions of annual labor, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made," a peaceable entry for relocation may be made after such failure, although the claim is occupied by the original locator.—*DuPratt v. James* (Cal.), 4 Pac. 562; so, a grantor of a claim may acquire title thereto by location against the person claiming under his deed, who has failed to perform his annual labor.—*Blake v. Thorne* (Ariz.), 16 Pac. 270; for, a failure to comply with Rev. St. U. S. Sec. 2324, requiring annual labor, renders the claim subject to relocation.—*Morgan v. Tillotson* (Cal.), 15 Pac. 88. See further

as to Annual Labor, Sec. 2565, this Code, and note thereunder.

**EFFECT OF ACQUISITION BY ALIENS:** Mining claims acquired by a resident alien from one who has located properly are not subject to relocation.—*Ferguson v. Neville*, 61 Cal. 356; *Gormann Mining Co. v. Alexander*, 2 S. Dak. 566; 51 N. W. 346; but see *Tibbits v. Ah Tong*, 4 Mont. 548, 2 Pac. 759, 768.

**BURDEN OF PROOF ON RELOCATOR:** The validity of a prior location being admitted, the burden of proof is on the relocater to show that the defendant failed to do his assessment work.—*Quigley v. Gillett* (Cal.), 35 Pac. 1040. As to burden of proof, see further, note under Section 2565, this Chapter.

**TIME WHEN SUBJECT TO RELOCATION:** If the plaintiffs performed the acts required by law to locate a quartz claim, except the labor (the year not having expired) and the defendants undertook to take possession of the ground, they were trespassers.—*Atkins v. Hendree*, 1 Idaho, 95. A party cannot make a valid relocation of lands legally possessed by another until the owner's rights have been abandoned, forfeited or otherwise ended.—*Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413.

**Section 2561. Notice must Claim but One Location:** No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport to claim more than one location it is absolutely void.

1899 5th Ses. p. 238, Sec. 8; 1895 3d Ses. p. 28, Sec. 8.

#### PLACER CLAIMS.

**Section 2562. Placer Claims may be Located when:** Placer claims, as mentioned in section 2329 of the Revised Statutes of the United States, may be located for the purpose of mining deposits and precious stones after the discovery of such deposits.

1899 5th Ses. p. 239, Sec. 11.

Placer claims include all forms of deposits excepting veins of quartz or

other rock in place.—*Gregory v. Pershaker* (Cal.), 14 Pac. 401.

**Section 2563. Manner of Making Location. Filing Notice:** The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones, must, at the time of making the location, place a substantial post or monument



as is required in the location of quartz claims at each corner of the location and must also post on one of the same a notice of location containing the date of the location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim. Within fifteen days after making the location, the locator must make an excavation upon the claim of not less than one hundred cubic feet, for the purpose of prospecting the same. Within thirty days after the location, the locator must file for record in the office of the county recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location, to which must be attached an affidavit such as is required in the case of quartz claims.

1899 5th Ses. p. 239, Sec. 12; 1897 4th Ses. p. 13; 1895 3d Ses. p. 29, Sec. 12; 1887 R. S. Sec. 3120.

Location notice, where filed, fees; Sec. 2568.

Location of quartz claims, manner of making: Sec. 2557.

**MINERS' CUSTOMS:** A miners' custom limiting placer claims to eighty rods in length, to each location, is a reasonable one and is binding on all the locators in the community where it is in force.—*Rosenthal v. Ives*, 2 Idaho, 244, 12 Pac. 904. Where a mining custom or regulation is shown to have existed, such regulation is presumed so to exist until the contrary appears.—*Riborado v. Quang Pang Mining Co.* 2 Idaho, 131, 6 Pac. 125.

PROVISIONS APPLICABLE TO BOTH LODE AND PLACER CLAIMS.

**Section 2564. Affidavit Necessary to Accompany Filing of Notice:**

At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named in the same must make and subscribe an affidavit, in writing on or attached to the notice, substantially in the following form, to-wit:

State of Idaho,

County of.....

} ss.

I ....., do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such) and that I am acquainted with the mining ground described in this notice of location, and herewith called the ..... ledge, lode or claim; that the ground and claim therein described or any part thereof has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in the case of quartz claims) that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

Signature.....

Subscribed and sworn to before me this .... day of .... A. D. 19..

Signature.....

1899 5th Ses. p. 240; 1895 3d Ses. p. 29, Sec. 13, amending laws 1887 R. S. Sec. 3104; 1881 11th Ses. p. 264, Sec. 5.

**AGENT:** An agent or attorney in fact may locate a mining claim for his principal and may do everything neces-

sary to perfect such location, including the making of the affidavit required by the statute.—*Dunlap v. Pattison* (Idaho), 42 Pac. 504.

**CITIZENSHIP:** See note under Aliens to Section 2555, this Chapter.

**Section 2565. Annual Proof of Labor, Contents of Affidavit; Effect of as Evidence, Fees:** Within sixty days after any time set or period allowed for the preformance of labor, or making improvements upon any lode, or placer claim, the person in whose behalf such work or improvement is performed or some person for him must make and record an affidavit in substance as follows:

State of Idaho, }  
County of..... } ss.

Before me the subscribed, personally appeared..... who being first duly sworn says that at least.....dollars worth of work for improvements were performed or made upon .....claim, situate in.....mining district, county of.....State of Idaho: That such expenditure was made by, for, or at the expense of....., owner of said claim for the purpose of holding said claim and all stakes, monuments or trees marking boundaries of said claims are in proper place and position.

Subscribed and sworn to before me this.....day of.....19...

The fee for administering the oath and recording the foregoing affidavit, when taken before the county recorder or deputy mining recorder shall be fifty cents; the fee for recording the same when the oath is taken before any other officer authorized to administer oaths shall be fifty cents.

Such affidavit, or a certified copy thereof in case the original is lost shall be prima facie evidence of the performance of such labor. The failure to file such affidavit shall be considered prima facie evidence that such labor has not been done.

1889 5th Ses. p. 441, amending act 1839 5thSes. p. 238, Sec. 6; 1895, 3d Ses. p. 27, Sec. 6.

**THE AFFIDAVIT:** Labor affidavits are not void because they relate to more than one lode.—*McGinnis v. Egbert* (Colo.), 5 Pac. 652.

**WHAT CONSTITUTES LABOR ON CLAIM:** Personal expenses and the value of the locator's time in endeavoring to procure water to operate a mill for crushing ore from the mine, are not work done on the claim.—*Du Prat v. James* (Cal.), 4 Pac. 562; but work done outside of a claim, if done as a purpose or means of developing or prospecting the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the limits of the claim itself.—*Harrington v. Chambers* (Utah), 1 Pac. 362. So labor performed by the owner of a mine in constructing a wagon road

thereto for the purpose of better developing and operating the same.—*Doherty v. Morris* (Colo.), 28 Pac. 85; and where mining works are idle, the time and labor of a watchman or custodian expended on the property in taking care of it, are labor done on the claim.—*Lockhart v. Rollins* (Idaho), 21 Pac. 413, 2 Idaho, 503; *Altoona Quicksilver Mining Co. v. Integral Quicksilver Mining Co.* (Cal.), 45 Pac. 1047. But the erection of a house outside of the boundaries of the claim, for the convenience and shelter of the miners was held not to be such labor.—*Remington v. Bandit* (Mont.), 9 Pac. 819; and, in general, where work is done outside of the exterior limits of the claim, the burden of proof is on the workers to show that it inured to the benefit of such claim.—*Hall v. Kearney* (Colo.), 33 Pac. 373. But if the work is in fact done for the development of the claim,



it may properly be considered as annual assessment work for such claim, notwithstanding the fact that it was performed outside of the exterior lines of such property.—*Id*; *Smelting Co. v. Kemp*, 104 U. S. 636, and it is immaterial whether the improvement is upon patented or unpatented land, except as this may throw light upon the intention of the parties in doing the work.—*Hall v. Kearney*, *supra*. "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was done for the improvement of such claim, and no other."—*Kramer v. Settle*, 1 Idaho, 485.

**BURDEN OF PROOF** The validity

of a prior location being admitted, the burden of proof is on the relocater to show that the defendant failed to do the work.—*Quigley v. Gillett* (Cal.), 35 Pac. 1040. But although the burden of proof is on the party relying on the forfeiture, the burden is discharged, *prima facie*, by showing that no work during the year alleged, had been done upon the lode, or within the surface boundaries of the claim. If labor was in fact performed upon adjacent property that might properly be considered as development work for the claim, it devolved upon the party claiming such development to show such facts affirmatively.—*Hall v. Kearney*, 18 Colo. 505, 33 Pac. 373.

**Section 2566. Amended Locations:** If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this Law, and he shall be desirous of securing the benefits of this Chapter, such locator or his assigns, may file an additional certificate subject to the conditions of this Chapter and to contain all that this Chapter requires an original certificate to contain: *Provided*, That such amended location does not interfere with the existing rights of others at the time when such amendment is made.

1899 5th Ses. p. 238, Sec. 5; 1895 3d Ses. p. 27, Sec. 5.

**AGENT:** An agent or attorney in fact may locate a mining claim for his principal and may do everything necessary to perfect such location.—*Dunlap v. Pattison* (Idaho) 42 Pac. 504.

**AMENDMENT RELATES BACK:** Where an original location is subject to amendment, an amendatory location thereof will relate back to the date of

the original location.—*Moyle v. Bulene* (Colo.), 44 Pac. 69, but this is not so where the original location was void.—*Id*. And it is not so where the amendment is made after adverse rights have attached.—*McGinnis v. Egbert* (Colo.), 5 Pac. 652; *Craig v. Thompson* (Colo.), 16 Pac. 24. But, an amendment of location may be filed after suit brought concerning the claim, with the same effect as if brought before.—*Johnson v. Young* (Colo.), 34 Pac. 173.

**Section 2567. Deputy Mining Recorder:** For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where he may deem it necessary, and at all places more than twenty miles distant from an existing office whenever ten or more mining locators interested, petition for the appointment of a deputy. Upon failure of any recorder to appoint a deputy for ten days after the petition in writing has been presented to him, the resident miners in such district may appoint temporarily, one of their number to act as the recorder for the district, whose record shall be as valid as if made by the deputy, and must be entered by the recorder as hereinafter required: *Provided*, That whenever at any time afterwards, the recorder has appointed a

deputy for such district or place, the authority of the person elected, by the resident miners ceases.

1899 5th Ses. p. 239; 1895 3d Ses. p. 28, 3103; 1881 11th Ses. p. 263, Sec. 4. Sec. 9, amending laws 1887 R. S. Sec.

**Section 2568. Location Notice, where Filed. Fees:**

The location notice herein required to be recorded must be recorded by the deputy appointed for the district, or the person appointed for that purpose as above provided (when the legal fee therefor is tendered) in a book to be kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. The fee to be tendered for making such record, administering the oath to the locator and certifying the same, for indexing the names appearing on the notice, and to include recording the notice by the recorder as hereinafter required, and the indexing by said recorder is two dollars, which fee must be equally divided between the recorder and the deputy or the person acting under an election as hereinbefore provided, and no other additional sum of money must be demanded or received by either of them for any services connected with the recording of any location notice made pursuant to the requirements of this Chapter.

1899 5th Ses. p. 240; 1895 3d Ses. p. 30, must be filed: Sec. 2559.  
Sec. 14, amending laws 1887 R. S. Sec. When location notice of placer claims  
3105; 1881 11th Ses. p. 264, Sec. 6. must be filed: Sec. 2565.  
When location notice of lode claims

**Section 2569. Duty of Deputy Recorder to Transmit Notices to Recorder. Record by Recorder:** The deputy recorder of mining claims of each district, or the person temporarily appointed, as hereinabove provided, to make the record in case of the failure of the recorder to appoint a deputy, must at least once in each month, transmit to the recorder at the county seat, all the notices of location filed with him for record and not previously transmitted, which must at once be recorded by said recorder, in a book to be kept in his office, and be known as the "Book of Mining Claims." The names of all persons appearing in every notice of location must be indexed by the recorder, said names being arranged in said index in alphabetical order, according to the first letter of the surname of said locators.

1887 R. S. Ses. 3106; 1881 11th Ses. p. 265, Sec. 7.

**Section 2570. Restrictions on Deputy Recorder:**

The deputy recorders provided for in this Chapter, are not, by virtue of the provisions hereof, authorized to perform any other than the special duties herein specified. They must keep an official seal, and the records in their custody are public records, but the seal of a deputy recorder must not be attached to any paper except for the purpose of authenticating certificates attached to transcripts of the records in his custody as deputy recorder.

1887 R. S. Sec. 3107; 1881 11th Ses. p. 265, Sec. 8.

**Section 2571. When Right to Mine is Separate from Ownership of Surface Ground:** When the right to mine is



in any case separate from the ownership or right of occupancy of the surface ground, the owners or rightful occupants of the surface ground may demand satisfactory security from the miners, and if it be refused or not given, may enjoin such miners from working such ground until such security is given. The court granting the writ of injunction shall fix the amount and nature of the security.

1899 5th Ses. p. 239, Sec. 10; 1895 3d Ses. p. 29, Sec. 10.

#### RIGHTS OF WAY AND EASEMENTS FOR THE DEVELOPMENT OF MINES.

**Section 2572. Right of Way May be Had and Acquired:** The owner, locator, or occupant of a mining claim, whether patented under the laws of the United States or held by location or possession, may have and acquire a right of way for ingress and egress, when necessary in working such mining claim, over and across the lands or mining claims of others whether patented or otherwise.

1887 R. S. Sec. 3130; 1877 9th Ses. p. 70, Sec. 1.

**Section 2573. Right of Way and Easements, Right to:** When any mine or mining claim is so situated, that for the more convenient enjoyment of the same, a road, railroad or tramway therefrom, or a ditch or canal to convey water thereto, or a ditch, flume, cut or tunnel to drain or convey the waters or tailings therefrom, or a tunnel or shaft may be necessary for the better working thereof, which road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, may require the use or occupancy of lands or mining grounds, owned, occupied or possessed by others than the person or persons or body corporate, requiring an easement for any of the purposes described, the owner, claimant or occupant of the mine or mining claim first above mentioned, is entitled to a right of way, entry and possession for all the uses and privileges for such road, railroad, tramway, ditch, canal, flume, cut, shaft or tunnel, in, upon, through and across such other lands or mining claims.

1887 R. S. Sec. 3131; 1881 11th Ses. p. 266, Sec. 2.

**DUMPING ON DUMP OF PRIOR LOCATOR:** In the absence of any agreement, regulation, or custom authorizing it, one person has no right to run his tail race or sluicing flume onto the dumping ground of another who had prior right thereto, and no damage can be claimed of the latter for filling up such raise or flume, if he does not prevent the former from dumping on his own ground.—*Ralston v. Plowman*, 1 Idaho, 595.

**TUNNELS:** A tunnel located or run for the development of veins or lodes, pursuant to the provisions of Sec. 2332, Rev. St. U. S., becomes a mining claim and entitles the owner thereof to

make and adverse claim against one claiming to locate upon the line of the tunnel, and while the same was being prosecuted with reasonable diligence, such tunnel owner is entitled to proceed under the provisions of Sec. 2326, Rev. St. U. S.—*Back v. Sierra Nevada Consolidated Mining Co.* 2 Idaho, 386, 17 Pac. 83. In an action to restrain a defendant from extending a tunnel on his claim under the plaintiff's mining ditch, where the plaintiff had no interest in the defendant's claim, except the right of way for the ditch, it is immaterial whether the defendant's claim was of value as a mine or not.—*Lorenz v. Waldron*, 96 Cal. 243, 31 Pac. 54.

**Section 2574. General Reference:** The rights granted by the two preceding Sections may be obtained and enforced in the manner provided in Title XIX, Chapter CLXXIX, Sections 3861 to 3871, inclusive, of the Code of Civil Procedure.

New Sec. by Commission.

**Section 2575. Right to Drive Tunnel Through Another's Claim:** Any person or company who has or may hereafter have a tunnel or cross-cut, the mouth of which is located upon his own ground or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of such tunnel, but not to follow or drive upon any vein belonging to the owner of such claim.

1899 5th Ses. p. 442, Sec. 1.

**Section 2576. Rights of Owner of Intersected Claim:** Each tunnel or cross-cut may be driven and worked for the purpose of drainage and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected, or his duly authorized agent shall have the right to enter such tunnel upon application to the owner or owners or person in charge of said tunnel without resorting to any process of law for the purpose of making a survey and inspecting such vein or veins as may be crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulk-heading, damming back or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims without the consent of the owner or owners thereof, it shall work a forfeiture of all rights granted under Section 2575.

1899 5th Ses. p. 442, Sec. 2.

**Section 2577. Ownership of Ore Extracted. Damages:** If any ore, the property of the owner of the claim intersected or crossed, be extracted in driving such tunnel, it shall be the property of the owner of the vein from which it was taken and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel.

1899 5th Ses. p. 442, Sec. 3.

**TRESPASS** Under Rev. St. U. S. Sec. 2336, in case of cross veins, the prior locator is entitled to all the ore within the space of intersection, and

the subsequent locator has a right of way through said space, but if he takes ore from the space, he is liable in trespass.—*Pardee v. Murray* (Mont.), 2 Pac. 16.

**Section 2578. Actions Involving Right to Vein; Burden of Proof:** In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel, the burden of proving that the vein so discovered is not the property of the adverse claimant in such action shall be on the tunnel owner.

1899 5th Ses. p. 442, Sec. 4.

## CHAPTER CVI.

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## APPROPRIATION AND USE OF WATER.

**Section 2579. Standard of Measurement of Water:**

A cubic foot of water per second of time shall be the legal standard for the measurement of water in this State.

1899 5th Ses. p. 380, Sec. 1.

**Section 2580. Right to Use, How Acquired:** The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation.



1899 5th Ses. p. 380, Sec. 2; 1887 R. S. Sec. 3155.

**APPROPRIATION** "Appropriation," so called, is not the doctrine of the common law.—*Lux v. Haggin*, 69 Cal. 255, 13 Pac. 654. Water flowing from springs upon the public land of the United States may be appropriated under the statute.—*Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587. The right to use water flowing in a stream over the public land of the United States may be acquired by appropriation.—*Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41, and this is so even as against one who

subsequently obtains title to the land from the government.—*Id.*

**APPROPRIATION BY ALIENS:** An alien may appropriate water, the tests of such appropriation being merely priority of possession and beneficial use without regard to the competency of the appropriator to pre-empt the place of intended use, and if the appropriation of water be considered as a mode of acquiring real property by purchase, the right of the alien to hold is good until "office found" and private individuals cannot treat his appropriation as void.—*Santa Paula Water Works v. Peralta*, 113 Cal. 38, 45 Pac. 168.

**Section 2581. Purpose of Appropriation:** The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.

1899 5th Ses. p. 380, Sec. 3; 1887 R. S. Sec. 3156.

**USEFUL PURPOSE:** A claim for mere speculative purposes is not a claim for a useful or beneficial purpose.—*Weaver v. Eureka Lake Co.* 15 Cal. 271; *Toohey v. Campbell* (Mont.), 60 Pac. 396. Merely cutting a ditch for a drain and using the water for no useful purpose, gives no priority.—*Maries v. Bicknell*, 7 Cal. 261; *McKinney v. Smith*, 21 Cal. 374. Appropriation is the intent to take, accompanied by some open physical demonstration of the intent, for some valuable use.—*McDonald v. Bear River, etc. Co.* 13 Cal. 220, 232. The water which an appropriator is entitled to use is not the quantity he diverts, but the quantity which he

or may be applied to a beneficial use, allowance being made for necessary loss in transit, though the court will take care that no unnecessary waste of the element is permitted.—*Riverside Water Co. v. Sargent*, 112 Cal. 230, 44 Pac. 560. The failure of one who has appropriated water to devote it to any beneficial use for the period of five years next before the commencement of an action against a subsequent appropriator, operated under this section to work a forfeiture of the plaintiff's rights by non-user as against the defendant.—*Smith v. Hawkins*, 120 Cal. 86, 52 Pac. 139.

The right to divert and appropriate: See<sup>2</sup> Sec. 3, Art. XV., Idaho Const.

**Section 2582. First in Time is First in Right:** As between appropriators, the first in time is the first in right.

1899 5th Ses. p. 380, Sec. 4; 1887 R. S. Sec. 3159.

Priority of appropriation: Idaho Const. Sec. 3, Art. XV.

**ADJUSTMENT BY THE COURTS:** The court must determine the amount and the date of each appropriation, and from these facts must determine the priority of right as between the parties.—*Kirk v. Bartholomew*, 2 Idaho, 1087, 29 Pac. 40; *Geertson v. Barrack*, 2 Idaho, 1066, 29 Pac. 42. A court of equity has power to ascertain and determine as between the several appropriators of the waters of a natural stream, the extent of the respective rights of each of the waters therein flowing, to regulate the use thereof in such a way as to maintain equality of rights in the enjoyment of the common property, and to enjoin a subsequent appropriator from interfering with the rights of the prior appropriators,

as ascertained and established by the courts.—*Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838; but where in an action to settle the water rights of various parties upon the stream, the district court, after establishing the priorities of the various appropriators, proceeded to decree the times and the quantity of and for which each appropriator was permitted to use such waters, it was held that it was not within the province of the court to dictate how or when the right acquired by the appropriator should be exercised, as long as such use was within the limits of his appropriation. — *McGinness v. Stanfield* (Idaho), 55 Pac. 1020.

**PRIORITY ONLY TO EXTENT OF ORIGINAL APPROPRIATION OR ACTUAL USE:** The plaintiff's predecessors located and appropriated 125 inches of water in E. creek. The pre-

decessors of the defendants then appropriated "all the surplus or available water" in the same creek and tributaries and used the same for mining purposes, through a ditch constructed the next year. During the year after that, the plaintiff's predecessors constructed another ditch with a capacity of 500 inches and connected the same with the first named ditch by a flume across E. creek, and also enlarged the first named ditch to a capacity of 500 inches. Held, that as against the defendants, the plaintiffs could only claim priority for 125 inches of the water of E. creek.—*Branstetter v. Williams* (Idaho), 57 Pac. 433. Under this section, held that H., whose grantor first appropriated all of the waters of G. creek and continually used the same for the purposes of irrigating lands owned by him upon and along said creek, is entitled to all the waters of the said creek to the extent of the capacity of his ditches necessary to the proper irrigation of his said lands, as against subsequent locators.—*Hillman v. Hardwick*, 2 Idaho, 983, 28 Pac. 438, case cited and approved in *Dunniway v. Lawson* (Idaho) 51 Pac. 1032. The act of Cong., July 26, 1866, Sec. 9 provided that, "whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested or accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The act of Cong., July 9, 1870, Sec. 17, provided that "all patents granted..... shall be subject to any vested and accrued water rights." In Idaho the superiors rights of prior appropriator were acknowledged by statute and the decisions of the courts. Held, that a prior appropriator of the water of a stream, all of which he claimed, had used and needed for irrigation, was entitled to the whole as against a patentee of land through which the stream flowed, though no custom to that effect was shown.—*Berry, J.*, dissenting. And where plaintiffs claim 600 inches of water in a stream, by prior appropriation, and it appears that there were but 150 inches in the stream, failure to find under what pressure the water is measured is not prejudicial to the defendant, who claims as riparian owner. Moreover, a sale by the plaintiffs of a part of the water claimed by prior appropriation does not show that

they attempted to appropriate more than they needed, where it appears that all the water of the streams was not sufficient to irrigate their land.—*Drake v. Earhart*, 2 Idaho, 716, 23 Pac. 541. The prior appropriators of water for irrigation purposes are entitled to the water so appropriated, necessary to the irrigation of their lands as against subsequent appropriators. And the court must determine the date and the amount of each appropriation, and from these facts determine the priority of right as between the parties, as declared by this section.—*Geertson v. Barrack*, 2 Idaho, 1066, 29 Pac. 42; *Kirk v. Bartholomew*, 2 Idaho, 1087, 29 Pac. 40. The right of a prior appropriator can not be divested on the ground that by mistake as to location of boundary, he has used the water on other lands than his own.—*Mahoney v. Neiswanger* (Idaho), 59 Pac. 561. The rights of a prior appropriator are limited by his beneficial use and not by the original capacity of his ditch, and where he has ceased to use only a specified quantity of water or has limited his regular use of it, for irrigation purposes, to certain days of the week, all of the water not used is subject to a subsequent appropriation by another.—*Santa Paula Water Works v. Peralta*, 113 Cal. 38, 45 Pac. 168.

**DISTURBANCE:** A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator, or to materially diminish the quantity or deteriorate the quality of the water to which the latter is entitled.—*Jukans v. Bergin*, 67 Cal. 267, 7 Pac. 684.

**PLEADING, CROSS COMPLAINT.** In an action by the plaintiffs against numerous defendants to settle the rights of the parties to the waters of a certain stream, various defendants having, in addition to their answers to the complaint of the plaintiffs, filed cross complaints asking affirmative relief against both the plaintiffs and certain of their co-defendants, the plaintiffs having been non-suited, the court, on motion of certain of the defendants, dismissed the cross complaints of the other defendants. Held, Error. The cross complainants were entitled to be heard upon their cross complaints in the action then pending.—*Taylor v. Bartholomew* (Idaho), 56 Pac. 325.

The doctrine of this section applied in *Dunniway v. Lawson* (Idaho) 51 Pac. 1032.

**Section 2583. Manner of Appropriating Water:** A person desiring to appropriate water must post a notice in writing in



a conspicuous place at or near the point of intended diversion, stating therein:

**FIRST.** That he claims the water there flowing, to the extent of (giving the number of cubic feet per second of time) and accurately describing the point of intended diversion by giving the legal subdivisions of the land, if on surveyed land, or in reference to some natural land mark, if on unsurveyed land, making it sufficiently definite for a person acquainted with the country to find the point from the description in the notice.

**SECOND.** The purpose or purposes for which he claims the water and the place or locality of its intended use.

**THIRD.** The general course, length and destination of the conduit by which he proposes to divert said water, and if for irrigation purposes, the general description and area of the land proposed to be irrigated by said conduit.

**FOURTH.** A copy of the notice must, within fifteen days after it is posted, be recorded in the office of the recorder of the county in which it is posted; and a duplicate copy of thereof sent to the state engineer for filing in his office.

1899 5th Ses. p. 380, Sec. 5, 1887, R. S. Sec. 3160.

**POSTING NOTICES:** One who appropriates the water of a running stream by an actual diversion thereof for the purposes of irrigation, acquires the right to the use thereof as against a claimant who subsequently posts his notices upon the stream in accordance with the statute and who proceeds thereafter, as required by the statute to perfect his rights, although the prior appropriator has not followed the statute in making his appropriation. *Wells v. Mantes*, 99 Cal. 583, 34 Pac. 324. The scope and purpose of the statutory provisions upon water rights was merely to establish a procedure for the claimants of the right to use the water whereby a certain definite time must be established as the date at which their title should accrue by relation, and a failure to comply with the rules there laid down does not deprive an

appropriator by actual diversion of the right to the use of the water as against a subsequent claimant who complies therewith.—Id. If an appropriator of water, after duly posting his notices, and while diligently prosecuting the work of appropriating the water, posts a second notice of appropriation of the same water, he does not thereby abandon his first claim. *Osgood v. El-lorado, etc.*, Co. 56 Cal. 571.

**THE CONDUIT:** Possessory rights to rights of way for irrigating ditches, and the right to use the water, may each have an existence independent of the other. *Ada County Farmers' Irrigation Co. v. Farmers' Canal Co., Limited*, (Idaho), 51 Pac. 990. The ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch.—Id. One may own a ditch without owning a water right.—*Stocker v. Kirtley*, (Idaho) 59 Pac. 891.

**Section 2584. Diversion of Water, when Must Commence:** Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow, rain or cold weather.

1899 5th Ses. p. 381, Sec. 6, 1887, R. S. 3161.

**REASONABLE TIME FOR COMPLETION:** The statute declares the diligence necessary to be exercised in conducting the water to the place of intended use, after location; but the law is silent as to the diligence to be exercised in making application of the wa-

ter appropriated. The appropriator would no doubt, be entitled to a reasonable time in which to get his land under cultivation, and to make such application. If that be so, then it follows that what is a reasonable time is a question of fact dependent upon the circumstances of each particular case. A person who complies with the law

as to locating and conducting the water to the point of intended use, has such time as he may need or require, using ordinary diligence, to get his land under cultivation, and to make

application of such water to the intended use; such time, at least, as is reasonable under the circumstances of the case.—*Conant v. Jones*, (Idaho) 32 Pac. 250.

**Section 2585. Completion Defined:** Completion means conducting the waters to the place of intended use.

1899 5th Ses. p. 381, Sec. 7; 1887, R. S. Sec. 3162.

**TIME LIMIT:** Appropriators of water for irrigation purposes, after conducting the water to the place of intended use, have a reasonable time in which to apply it to the use intended. They may add to the acreage of cultivated land from year to year, and make application of water thereto for irrigation as their necessities demand, or as their abilities may permit; until they have put to a beneficial use the entire amount of water at first diverted by them; provided that the amount is needed for the reasonable irrigation of the land.—*Conant v. Jones*, (Idaho), 32 Pac. 250. Where one has acquired by appropriation a limited right of diversion, and has lost further claim to appropriation by failure to complete the whole diversion called for by his no-

tice of appropriation within a reasonable time, he cannot increase the amount of his diversion thereafter to correspond with his notice of appropriation, to the prejudice of the rights of a riparian owner.—*Conkling v. Pacific Improvement Co.*, 87 Cal., 296, 25 Pac. 399. A prior appropriator of water can only hold the maximum amount actually used for a beneficial purpose within the time which would otherwise bar his claim for non-user.—*Smith v. Hawkins*, (Cal.), 52 Pac. 139. One who files a notice of appropriation of water; but does not construct a ditch to divert it, and never takes any of the water until eight or ten years after, when he then diverts it in two or three instances in a fugitive manner by tapping the ditch of another, makes no valid appropriation.—*Cardoza v. Calkins*, 117 Cal. 106, 48 Pac. 1010.

**Section 2586. Use of Channel of Another Stream:** The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

1887 R. S. Sec. 3158.

Rights cannot be acquired to the waters of springs situated along the channel of a stream, and which constitute its direct source of supply, by entering upon, clearing out, and thereby increasing the water supply, as against prior appropriation in good faith of all the waters of the stream.

**QUERY**, whether one can bring water from another or independent source into a natural stream whose waters have been appropriated, and use the channel of such stream to conduct the waters thus brought in, to another point, to be there diverted and used? Not decided.—*Malad Valley Irrigating Co. v. Campbell*, 2 Idaho, 378, 18 Pac. 52.

**Section 2587. Right to Use Relates Back to Date of Notice; Extent of Use:** By compliance with the above rules the claimant's right to the use of water relates back to the time the notice was posted; and all land which is susceptible of irrigation from any ditch, canal or conduit shall be entitled to the use of water from the same to the full extent of the perfection of such water appropriation, upon the payment of such annual charges as may be determined under the provisions of this Chapter.

1889 5th Ses. p. 381, Sec. 8, 1887, R. S. Sec. 3163.

**THE DOCTRINE OF RELATION:** The object of the legislature in prescribing that a notice of appropriation be posted and that a record thereof be made and that work be commenced within sixty days after the posting of

the notice, and be diligently prosecuted thereafter, etc., is merely, as declared by the statute, to enable the claimant to avail himself of the doctrine of relation as against an intervening appropriator.—*De Nocochea v. Curtis*, 80 Cal., 397, 20 Pac. 563, 22 Pac. 198.



**Section 2588. Failure to Comply with Law Deprives of Right to Use:** A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complied therewith, except as provided in the next Section.

1899, 5th Ses. p. 381, Sec. 9, 1887. R. S. Sec. 3164.

"CLAIMANTS." The word "claimants" used in the statute which provides that a failure to comply with the rules of the Code "deprives the claimants of the right to use the water as, against a subsequent claimant who

complies therewith," refers to a party posting and recording the notices required, and does not apply to an appropriator by actual diversion.—Wells v. Mantes 99 Cal., 583, 34 Pac. 324. See further, note under Sec. 2583 this Chapter.

**Section 2589. Accrued Rights Secured. Right to Cross Ditch:** All ditches, canals, or other works heretofore made, constructed, or provided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed without regard to, or compliance with, the requirements of this Chapter, and such person, company, or corporation, owners of any such ditch, flume or other conduit, cannot lawfully deny to any other person, company or corporation the right to cross their right of way with other ditch, flume, or conduit either upon a higher or lower level, where the same can be done in a convenient and safe manner: *Provided*, That such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another.

1899 5th Ses. p. 381, Sec. 10; 1887 R. S. Sec. 3165; 1881, 11th Sec. p. 268, Sec. 8.

ACCRUED RIGHTS: It is not within the province of a court to dictate how or when the right acquired by the appropriator should be exercised, so long as such use was within the limits of his

appropriation, in an action to settle the rights of various parties upon a stream, after the court had established the priorities of the various appropriators.—McGinniss v. Stanfield, (Idaho) 55 Pac. 1020. See further, notes under Section 2582.

**Section 2590. May Change Place of Diversion and Use:** The person entitled to the use of water may change the place of diversion, if others are not injured by such change; and may extend the conduit by which the diversion is made to places beyond that where the first was made.

1899 5th Ses. p. 381, Sec. 11; 1887, R. S. Sec. 3157.

CHANGE OF PLACE OR PURPOSE: The owner of a water right may change the place of diversion to a point higher up the stream, provided the rights of others are not injuriously affected thereby; but he does not by such change increase or diminish the amount of the share which he is entitled to divert.—Smith v. Corbit, 116 Cal. 587, 48 Pac. 725; Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 Pac. 168. So a riparian owner or an appropriator of water may change the place of diversion, and the appropriator may do so, even on the servient tene-

ment, when others are not injured by the change.—San Louis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Ramelli v. Irish, 96 Cal. 214; 31 Pac. 41. Moreover, he may, under similar limitations, take the water from any point on the stream.—Jukans v. Bergin, 67 Cal. 267, 7 Pac. 684; and the water right need not be appurtenant to any particular ditch. The water right is the principal thing and may be used through any ditch, and the place of diversion and use or the purpose to which the water may be applied may be changed.—Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119.

**CHANGE OF AMOUNT:** The plaintiffs' predecessors located and appropriated 125 inches of the waters of E. creek in 1863 and utilized the same for placer mining. In December, 1863, the predecessors of the defendants located and appropriated "all the surplus water in E. creek and tributaries," and used the same through a ditch constructed in 1864. In 1865, the plaintiffs' predecessors constructed another ditch with a capacity of 500 inches and connected it with the first named ditch by a flume

across E. creek, and also enlarged the first named ditch to a capacity of 500 inches. Held, that as against the defendants, the plaintiffs could only claim priority for 125 inches of the water of E. creek.—*Branstetter v. Williams*. (Idaho) 57 Pac. 433. But if the owner of a ditch is entitled to all the water flowing down a stream where the ditch starts out, other parties having ditches on the same stream cannot complain of its enlargement.—*James v. Williams*, 31 Cal. 211.

**Section 2591. Domestic Purposes Defined. Notice of Right:** The phrase "domestic purposes" as contained in this Chapter shall be construed to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household. All persons or corporations owning or claiming any water right or water rights must, within six months after this becomes a law, record with the recorder of the county a notice of the amount of the claim of appropriation, location and specific use, and the date of such appropriation.

1899 5th Ses. p. 381, Sec. 12.

Where water has been diverted for domestic purposes, and an excess has been allowed to distribute itself

over several acres of hay land, there was no valid appropriation of such excess.—*Power v. Switzer*, (Mont.) 55 Pac. 32.

**Section 2592. Utilizing Seepage, Waste and Spring Water, Rules Governing:** All ditches now constructed or which may hereafter be constructed for the purpose of utilizing seepage, waste or spring water of the State, shall be governed by the same laws relating to priority of right as those ditches, canals, and conduits constructed for the purpose of utilizing the waters of running streams.

1899 5th Ses. p. 383, Sec. 23.

Where the owner of a spring of living water, supplied by percolation only, and having no natural channel or outlet, constructed an artificial channel, by means of which he conducted the water over certain intermediate vacant lands to his residence, and a subsequent occupant of a portion of the intervening land enjoyed the use of the water flowing through the channel for fifteen years, such occupant acquired no rights as against the owner of the spring, and

could not prevent him from tapping such spring and using all the waters for his own profit. *Hanson v. McCue*, 42 Cal. 303. Moreover, where parties have used the waste water of a ditch for several years, by parol permission of the owners of the ditch, with no further claim or right therein, the owners of the ditch are the absolute owners of the water and the users of the waste water never acquired any riparian right thereto.—*Green v. Carotta*, 72 Cal., 267, 13 Pac. 685.

**Section 2593. Rights Established by Decree of Court:** The proprietors of any ditch, canal, or conduit, or other works for the carriage of water, whose right relative to the quantity of water they shall be entitled to divert by means of such works shall have been established by any decree of the court, shall be entitled to divert such quantity measured at the point of diversion, subject, however, to all prior rights.

1889 5th Ses. p. 386, Sec. 32.

See not under Section 2582, this Chapter.

**Section 2594. Rights of Land Owners:** All persons, companies, and corporations, owning or claiming any lands situated



on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

1887 R. S. Sec. 3180; 11th Ses. p. 269, Sec. 10.

#### DISTRIBUTION OF WATER.

**Section 2595. Duty of Owner of Canal to Keep Flow of Water:** Every person, company or corporation owning or controlling any ditch, canal or conduit for the purpose of irrigation shall, during the time from April 1st to the first day of November of each year keep a flow of water therein, sufficient to the requirements of such persons as are properly entitled to the use of water therefrom: *Provided, however,* That when the public streams or other natural water sources from which the water is obtained are too low and inadequate for that purpose, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources as provided by law.

1899 5th Ses. p. 382, Sec. 15.

**Section 2596. Owner of Canal Must Have Same Ready to Deliver Water, when:** The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water.

1899 5th Ses. p. 382, Sec. 16.

**Section 2597. Appointment of Watermaster; His Duty:** It shall be the duty of those owning or controlling any ditch, canal or conduit to appoint a superintendent, or watermaster, whose duty it shall be to measure the water from such ditch, canal or conduit through the outlets of those entitled thereto, according to his pro-rata share, and no account or demand for the use of such water during any time such superintendent or watermaster is not so employed is valid or collectible.

1899 5th Ses. p. 382, Sec. 17 and later part of R. S. Sec. 3201; 1881, 11th Ses. p. 274, Sec. 2.

**Section 2598. Liability for Failure to Deliver Water:** Any superintendent of any person having control or charge of the said ditch, canal or conduit who shall wilfully neglect or refuse to deliver water as in this Chapter provided and the owner or owners of such ditch, canal or conduit, shall be liable in damages to the person or persons deprived of the use of water to which he or they was or were entitled as herein provided.

1899 5th Ses. p. 382, Sec. 18.

LIVER WATER: Penal Code, Sec. 5040.

**Section 2599. Water Must be Furnished upon Demand:** Any person, company or corporation owning or controlling any canal or irrigation works for the distribution of water under

a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: *Provided*, That no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to by reason of having complied with the laws in regard to the appropriation of the public waters of this State.

1899 5th Ses. p. 382, Sec. 19.

**Section 2600. Manner of Distribution. Amount to be Used:** Any person or persons owning or controlling land which has or has not been irrigated from any such canal, shall on or before January 1st of any year, inform the owner or person in control of such canal whether or not he desires the water from said canal for the irrigation of land during the succeeding season, stating also the quantity of water needed. In distributing water from any such canal, ditch or conduit during any season, preference shall be given to those applications for water for land irrigated from said canal the preceding season, and a surplus of water, if any there be, shall be distributed to the lands in the numerical order of the applications for it. But no demand for the purchase of a so-called "perpetual water right" or any contract fixing the annual charges or the quantity of waters to be used per acre shall be imposed as a condition precedent to the delivery of water annually as provided in this Chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land and the annual charges to be made and to be fixed under the further provisions of this Chapter, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered.

1899 5th Ses. p. 383, Sec. 20.

**Section 2601. Person Must Not Waste Water:** No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates and any person using an excess of water, is liable to the owner of such ditch or canal, for the value of such excess; and in addition thereto, is liable to all damages sustained by any other person, who would have been entitled to the use of such excess of water, as fixed by this Section.

1887 R. S. Sec. 3190; 1881, 11th Ses. p. 273, last par. Sec. 19.

**Section 2602. Owner of Ditch Must Prevent Waste:** The owner or owners of any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair, in order to prevent the water from wasting during the irrigation season, and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or can be used for beneficial or useful purposes; it be-



ing the purpose of this section to prevent the wasting and useless discharge and running away of water.

1899 5th Ses. p. 383, Sec. 22.

**Section 2603. Must Erect Headgates and Measuring Devices:** All persons, companies, corporations or communities of persons who have heretofore diverted, or who may hereafter divert water for irrigation or other beneficial purposes from any of the public streams or other natural water sources, shall erect and maintain in good order, suitable and substantial headgates and measuring devices in connection therewith. And in case of failure or neglect or refusal so to do after five days' notice has been given by the board of county commissioners, then said headgates, measuring devices or wastegates shall be constructed by the board of county commissioners of the county in which said headgates, measuring devices, and wastegates are required to be constructed. And if on demand by the said commissioners, the owner or owners of any such ditch, canal or conduit, or other water works upon which said headgates and measuring devices have been so constructed, shall refuse to pay the reasonable expenses thereof, then the said board of county commissioners shall bring suit before any court having competent jurisdiction in the manner of recovery of money for debt.

1899 5th Ses. p. 383, Sec. 24.

**Section 2604. State Engineer Must Devise System of Measurement:** It shall be the duty of the State engineer to devise a simple, uniform system for the measurement and distribution of water.

199 5th Ses. p. 383, Sec. 21.

**Section 2605. Boards of Water Commissioners:** The boards of county commissioners of the respective counties of this State are hereby created boards of water commissioners, with power to enforce the provisions of this Chapter, and for the better discharge of their duties they shall have authority to make such other regulations to secure the equal and fair distribution of water in accordance with the rights of priority of appropriation as may in their judgment be needed in their respective counties: *Provided*, Such regulations shall not be in violation of any part of this Chapter, or other laws of the State, but merely supplementary to and necessary to enforce the provisions of this Chapter and general laws on the subject of irrigation.

1899 5th Ses. p. 386, Sec. 34.

**Section 2606. Duty of County Surveyor:** It shall be the duty of the county surveyor, when so ordered by the board of county commissioners, to make or cause to be made careful measurements and to ascertain the carrying capacity of any or all ditches, canals, or feeders within his county, and he shall issue certificates of all ditches, canals, or feeders so measured: *Provided*, That said measurements shall be made under the supervision of the state engineer.

1899 5th Ses. p. 387, Sec. 36.

**Section 2607. Compensation for Making Measurements:** The county surveyor and his deputies shall receive such compensation for making such measurements, as may be allowed by the board of county commissioners upon a showing made by the surveyor or his deputies, of the time occupied and the expense incurred by him or them in making such measurements, and said board shall have authority and it shall be its duty to apportion said expenses between the several owners of ditches so measured within such county.

1899 5th Ses. p. 387, Sec. 37.

#### FIXING RATE OF TOLL FOR WATER.

**Section 2608. County Commissioners to Hear Applications:** The county commissioners of each county now organized, and of each county to be hereafter organized in this State shall, at their regular session in January of each year and at such other sessions as they, in their discretion may deem proper, hear and consider all applications which may be made to them by any party or parties interested in either furnishing or delivering for compensation, or by any person or persons using or consuming water for irrigation or other beneficial purpose or purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: *Provided*, That when any ditch, canal or conduit shall extend into two or more counties, the county commissioners of each of such counties shall fix the maximum rate for water used in that county.

1899 5th Ses. p. 384, Sec. 26.

**SALE AND RENTAL OF WATER:**  
Wilterding v. Green, (Idaho) 45 Pac.  
134 construes the provisions of Art.  
XV of the State Constitution.

**REGULATION OF RATES BY THE**

**LEGISLATURE:** Under the Constitution, Art. VI, Section 6, the legislature cannot fix reasonable maximum rates to be charged for water under sale or rental.—Wilson v. Perrault, (Idaho) 54 Pac. 617.

**Section 2609. Order for Hearing; Time Allowed:** Every such board of county commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be charged or demanded for water from such ditch, canal or conduit, enter an order fixing a day not sooner than ten days thereafter, nor later than twenty days, (a special meeting may be called for that purpose) when they will hear all parties interested in such water works aforesaid, or in procuring water therefrom, for any of the said purposes as well as all documentary or oral evidence or depositions taken according to law, touching said ditch or other water works aforesaid, and the cost of furnishing water therefrom.

1899 5th Ses. p. 384, Sec. 27.



**Section 2610. Notice of Hearing; Proceedings on Hearing:** At the time so fixed, all persons as aforesaid on either side of the controversy in lands which may be irrigated by such ditch or other water works aforesaid, may appear by themselves or by their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water: *Provided*, The applicant or applicants, if the application be made by a party or parties as aforesaid desirous of procuring water, shall within ten days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be delivered to the owner or owners of such ditch, canal or conduit, or to the president, secretary, or agent of the company, if it be owned by a corporation or association having such officers; if any such owner cannot be found, a copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business. And if such ditch or water works aforesaid shall be owned by several owners, not being an incorporated company, it shall be sufficient to serve such notice by delivering a copy to a majority of them. If the applicant be the owner or party controlling such ditch, canal or conduit, such notice shall be given by causing printed copies of such order in hand bill form, in conspicuous type, to be posted securely in ten or more places throughout the county and the section watered by such ditch or other water works aforesaid, if the water be used for irrigation. The person or persons making such services or posting such printed copies shall make affidavit of the maner in which the same has been done, which affidavit shall be filed with the board of county commissioners. Depositions mentioned in Section 2609 to be used before said commissioners shall be taken by any officer in the State authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same.

1899 5th Ses. p. 384, Sec. 28.

**Section 2611. May Adjourn Hearing. What Evidence to be Received. Attendance of Witnesses. Order of Board:** Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary; but when in session they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well as concerning the original cost and present value of the works and structure of such ditch, canal or conduit, as well as the cost and expense of maintaining and operating the same, and all matters which may affect the establishment of reasonable maximum rates for water to be furnished and delivered therefrom, and they may issue subpoenas for witnesses which subpoenas shall be served in the same manner in which subpoenas are served in civil cases; and said board may also issue subpoenas for the production of all books and papers required before them. The district court of the proper county, or the judge thereof in vacation, may in case of refusal to obey the subpoenas of the board of county commissioners, compel obedience thereto, or punish for refusal to obey

after hearing, as in cases of attachment for contempt of such district court. Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal or conduit, or other water works in question with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other water works as last aforesaid within the county in which such commissioners act; and such rate shall not be changed within one year from the time when such rates shall be so fixed. *Provided*, That an appeal or writ of error shall lie in behalf of the proprietor of such works, or any person using or claiming to be entitled to use water therefrom, for review in the district court.

1899 5th Ses. p. 385, Sec. 29.

**Section 2612. In Fixing Rates, What to be Considered:** In fixing rates at which water shall be furnished, the board of commissioners shall take into consideration the cost of the works, the expenses of keeping the same in repair, and all other conditions that affect the cost to deliver the same. Whenever it shall appear to the board of county commissioners from competent evidence that any consumer or consumers of water distributed through any ditch or canal, is or are entitled to the distribution or use of any water therefrom, at not to exceed a proportionate amount of the actual cost of maintenance and operation of said ditch or canal, they shall upon request of such person or persons so entitled, fix the rate per cubic foot per second to be charged to such consumer or consumers, for the current year.

1899 5th Ses. p. 385, Sec. 30.

#### MISCELLANEOUS PROVISIONS.

**Section 2513. Annual Report of Water Company** It shall be the duty of any corporation owning or controlling any canal or irrigation works for the distribution of water under a sale or rental thereof in this State, to file before the first Monday in January in each year in the office of the county recorder in every county in which said company distributes water under such sale or rental upon a blank form to be prepared and furnished by him upon application, and a duplicate copy thereof with the state engineer, a statement showing the condition of the business of said corporation on December 31st, of the preceding year, which statement shall include the following.

First. A general description of the property of the company.

Second. A statement of its costs and estimated present value.

Third. The total amount and the character of all indebtedness of the company, including a list of all perpetual water rights sold and outstanding and their respective dates of execution, and the amount received from such sales.

Fourth. The amount due to said company and from what sources.

Fifth. The income of the company during the preceding calendar year and from what sources.



Sixth. The expenditures by the company during the same period and for what purposes.

Seventh. The total area of land watered from its works during the preceding season, that part of said area having no water rights attached being given separately.

Eighth. The number of acres of land under said ditch susceptible of irrigation.

Ninth. The capacity of its works and the quantity of water carried during the said season, as nearly as known.

Tenth. The amounts of recorded appropriations and the date of each.

Said statement shall be sworn to by the proper official of said corporation. Said statement required to be filed under this Section shall be kept on file in the office of said recorder and shall be open to inspection.

1899 5th Ses. p. 386, Sec. 35.

PENALTY FOR NEGLECT TO FILE

STATEMENT: Penal Code Sec. 5025.

1899 5th Ses. p. 384, Sec. 25.

**Section 2614. Owner Must Bridge Canal:** All owners of any ditch, canal, or conduit, or any other means for conveying water, shall build substantial bridges not less than sixteen feet wide, and with boards not less than two inches in thickness, unless the same shall be on a county or State road, then such boards shall not be less than three inches thick, at all places where any county or State road crosses the same, or any road kept open and used by any neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required after a notice of ten days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same and collect the cost thereof together with the costs of suit: *Provided*, That after said bridge shall have been constructed across any county or State road in accordance with the provisions of this Section it shall thereafter be maintained at the public expense.

When a ditch is constructed over public land, and thereafter such land is entered by the probate judge as a town site, and streets are laid out across such ditch, and in course of time it becomes necessary to bridge such ditch for the reasonable use of the street by the pub-

lic, it is the duty of the owners to construct such bridge at their own expense and if they fail to do so, the ditch becomes a public nuisance and may be bridged at the expense of the owner.—*Boise City v. Boise Rapid Transit Co.* 59 Pac. 716.

#### RIGHT OF WAY FOR DITCHES.

**Section 2615. Land Owner Entitled to Right of Way:** When any owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right of way through the lands of others, for the purposes of irrigation: *Provided*, That in the making, constructing, keeping up, and maintenance of such ditch, canal or conduit, through the lands of

others, the person, company, or corporation, proceeding under this Section, and those succeeding to the interests of such person, company, or corporation, must keep such ditch, canal, or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct, for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

1887 R. S. Sec. 3181; 1881 11th Ses. p. 269, Sec. 11.

**RIGHT OF WAY OVER GOVERNMENT LANDS:** A ditch constructed by the predecessors in interest of W., plaintiff, in 1879, while the lands of plaintiff were unoccupied public lands of the United States; the defendant afterward settled upon, entered, and acquired patent to said lands. Held, that Section 2339 Rev. St., U. S. vested in predecessors of the plaintiff, the right of way for the ditch in question when they accepted the offer of donation

therein made by the government in said section by constructing the said ditch. Section 2340—Id., which was in force at the time the defendant acquired his said patent, made the patent of defendant subject to plaintiff's right of way for ditch, and it is immaterial whether the said patent reserved this right to the plaintiff or not. This easement of the plaintiff in the lands of defendant is by the terms of Section 2825 Rev. St., Idaho, real estate.

Welch v. Garrett (Idaho) 51 Pacific 405.

**Section 2616. Proceedings upon Refusal of Right of Way:** In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in law of eminent domain.

1899 5th Ses. p. 382, Sec. 14.

**EMINENT DOMAIN:** Code Civ. Proc., Secs. 3841 et seq.

**Section 2617. Right to Dam Channel of Stream:** All persons, companies and corporations, owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel of, or upon banks or margin of the same, dams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the last Section.

1887 R. S. Sec. 2184; 1881, 11th Ses. p. 271, Sec. 14.

**Section 2618. Right of Way to Supply Water to Cities and Towns:** Where the owners of any springs, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object, it is necessary to cross with ditches, flumes or other conduits, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner provided in Section 2616.

1887 R. S. Sec. 3185; 1881, 11th Ses. p. 271, Sec. 15.

**Section 2619. Owner Must Keep Embankment in Good Repair:** The owners or constructors of ditches, canals,



works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others.

1887 R. S. Sec. 3186; 1881, 11th Ses. p. 271, Sec. 16.

**VIS MAJOR:** Irrigating companies using water are only required to prepare for such emergencies as may be reasonably expected and not for such storms of unusual violence as surprise reasonable men.—*Lisonbee v. Monroe Irrigation Co.* (Utah) 54 Pac. 1009.

**CONTRIBUTORY NEGLIGENCE:** Where, in an action to recover damages to plaintiff's land, caused by leakage from defendant's irrigating ditch, it appears that defendant knew of the defect in its ditch and permitted the leakage

to continue for over a year, error cannot be predicated on the court's refusal to permit defendant to show that at small expense plaintiff might have prevented the injury to her land.—*McCarty v. Boise City Canal Co.* 2 Idaho 225, 10 Pac. 623.

**CONSTRUCTION AND MANAGEMENT:** One erecting or maintaining a canal along the line of another's land, is liable for any damages resulting from a want of proper care in the management of the same or for a want of proper care in its construction.—*Arave v. Idaho Canal Co.* (Idaho) 46 Pac. 1024.

### **Section 2620. Rights Acquired Prior to this Act:**

Nothing in this Chapter contained must be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this Chapter; but this reservation in behalf of existing rights does not exempt such appropriators from liability as provided in the last Section.

1887 R. S. Sec. 3187; 1881, 11th Ses. p. 271, Sec. 17.

**Section 2621. Changing Line of Ditch:** Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch, or canal, by any one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal.

1887 R. S. Sec. 3189, portion of Sec. middle portion of Sec. 19.  
the balance repealed by house bill 183, See note under Sec. 2590.  
5th Ses. p. 380; 1881, 11th Ses. p. 272,

**Section 2622. Right of Way Over State Lands:** Any person or persons desiring to construct a ditch, canal, reservoirs or other works for carrying or distributing the public waters for any beneficial use over or upon any of the lands owned or controlled by the State of Idaho, shall be allowed the right of way for the same by filing in the office of the State engineer a map showing the location of such land by an accurate survey of such ditch, canal, reservoir or other irrigation works. Such map shall be drawn on tracing linen on a scale of not less than 1000 feet to the inch, and shall be accompanied by the field notes of such survey of such irrigation works.

In the case of a reservoir, the map shall show, by contour lines at intervals not greater than ten feet, the topographic features of such reservoir site, and shall state the capacity of such proposed reservoir

in acre feet; and when the dam or embankment of such reservoir shall be more than ten feet in height, plans showing the construction of such dam or embankment shall be filed in the office of said state engineer as provided by law. All such maps, plans and field notes shall be certified by the engineer under whose direction such surveys and plans were made. If such map or description is defective or incomplete, the State engineer may order the same to be corrected before the same shall be filed in his office: *Provided*, That the works for which the right of way is herein granted must be completed within the time mentioned in the application for the same, (which shall accompany such map) which shall in no case be more than five years from the time of filing such application and map; and the construction of the works herein mentioned must be commenced within one year after such application and map are filed, and be prosecuted to completion diligently and uninterruptedly on a scale reasonably commensurate with the magnitude of the proposed works, in order to obtain the right of way under this Section.

1901, 6th Ses. p. 199, Sec. 8.

### **Section 2623. Lands Reserved for Reservoir Sites:**

When it shall appear upon an investigation by the state engineer, that certain lands belonging to the State are more valuable for reservoir purposes than for any other purpose, the State board of land commissioners shall, upon being notified of this fact by the State engineer, withhold such lands from sale, and such lands shall be reserved by the State for storage purposes as a means of reclaiming other State lands in the vicinity, or to encourage the reclamation of other lands so reserved, may be acquired for reservoir purposes in the manner provided in the preceding Section: *Provided*, That whenever it shall appear to the satisfaction of the State engineer that an application for right of way under the provisions of this Chapter is made for purposes of speculation, or that any privileges enjoyed by virtue of this Chapter are used for speculation, or for purpose of depriving others of the beneficial use of the same right of way or any portion thereof; or when he is satisfied that the person or corporation applying for or holding such right of way is not able financially to carry on the work for which such lands are set aside, the said State engineer shall have the authority to refuse or withdraw such right or privileges: *Provided*, That any person or corporation affected by any such decision of the State engineer, and who shall feel aggrieved thereby, may appeal from such decision to the State board of land commissioners, who shall carefully consider the evidence submitted by such person or corporation together with a full report on the matter by the State engineer, and whose decision shall be final.

1901, 6th Ses. p. 199, Sec. 9.

**Section 2624. Enlargement of Ditch, Priorities:** When any ditch, canal or reservoir delivering or distributing water to several users has one or more rights or priorities by reason of enlargement made from time to time, the right of the land being irrigated by such works shall be divided into classes; right of the first class belonging to



those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities of such works; rights of any other class being determined in like manner; but all the rights belonging to the same class shall be equal and subject alike to the regulations of their respective class.

1901, 6th Ses. p. 200, Sec. 9a.

**Section 2625. All Waters Property of State, Appurtenant to Land:**

All the waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State are declared to be the property of the State, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the rights to the use of any of the waters of the State for useful or beneficial purposes are recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of the land or other thing, to which, through necessity, said water is being applied; and the right to continue the use of any of such water shall never be denied or prevented from any other cause than the failure on the part of user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water.

1901, 6th Ses. p. 200, Sec. 9b.

COMMUNITY WATER DISTRICTS.

**Section 2626. Water District, What Constitutes.**

**Watermaster:** Any vicinity or neighborhood the inhabitants of which use the waters of any ditch, stream, or spring for the purpose or irrigation, or have, or claim a common right to the waters of any ditch, stream, or spring for such purposes, constitute a water district, and a majority of such inhabitants having such common right may annually, on the fourth Monday of March at a meeting of such inhabitants, elect a water master for their district, whose duty it is to superintend the distribution of such waters among those having such common right, or who are accustomed to participate in such common use. The watermaster of the district, or if there be no watermaster, or upon his failure or neglect so to do, any six residents of the district entitled to such common right, must give three days' public notice of the time and place of such election, by posting written or printed notices thereof in three of the most public places in the water district. Said meeting must be opened at ten o'clock in the forenoon, and the majority of those present who are entitled to such common right, may organize the same and determine the manner of such election, and whether the same be by ballot or otherwise. The watermaster must execute to the county in which his district is situate, and file in the office of the county recorder, for the benefit of any

person who may be injured by his wanton or illegal act, or omission, as such, a bond in the sum of five hundred dollars, with two sufficient sureties, and conditional for the faithful and impartial discharge of his duties as watermaster of his district; and any person so injured may have an action on such bond in his own name for his actual damages. A watermaster may employ one or more deputies, as authorized by the inhabitants of his district claiming such common right, as aforesaid; and he is liable for their wanton and illegal acts upon his official bond; and, before entering upon their duties, the watermaster and his deputies, must take and subscribe an oath, before any magistrate, faithfully and impartially to discharge the duties of their office; and they may receive such compensation, to be paid in such manner as may be agreed upon with such inhabitants.

1887 R. S. Sec. 3200; 1881, 11th Ses. p. 273, Sec. 1.

**Section 2627. Duties of Watermaster in Distributing Water:** The watermaster and his deputies must regulate the distribution of water among the several ditches of his district, and among the several inhabitants who are entitled and accustomed to the use thereof, according to their respective rights and necessities, and when the quantity of water is not sufficient to afford a full supply to those entitled or accustomed to use the same, according to the usage of the district, the watermaster and his deputies must regulate the quantity used by each person, and the time at and during which, each person may use the same. *Provided*, Nothing in this Chapter must be so construed, as to interfere with the vested rights of individual companies or corporations, or in any manner to interfere with the rights of individuals, companies or corporations to the use and control of water, which is or may be their private property.

1887 R. S. Sec. 3202; 1881, 11th Ses. p. 274, Sec. 3.

**Section 2628. When Water Diverted Held to be a Common Right:** In case the volume of water in any stream is not sufficient to supply continually the wants for irrigating purposes of the owners or proprietors of land in any district or neighborhood in which customs exist, for distributing the waters amongst such owners or proprietors, under the direction or supervision of persons recognized by the community interested to have authority therein, the waters diverted must, in such case, be held to be a common right in those accustomed to a participation in the use and enjoyment of such distribution, and such customs must be upheld in all courts as conferring such common right in the same; but this Section does not affect any prior vested rights.

1887 R. S. Sec. 3188; 1881, 11th Ses. p. 271 Sec. 18.

**Section 2629. Assessments for Repair of Ditch:** When a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor



or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash to be recovered, with costs, in an action by the watermaster in his own name.

1887 R. S. Sec. 3203; 1881, 11th Ses. p. 275, Sec. 4.

**Section 2630. Providing Headgates and Dams:** The watermaster must see that there are provided the necessary and proper headgates and dams; and that the water is turned and runs into the ditches of his district at the proper season of the year; and he may require all persons receiving water to construct proper gates at the points at which they take water from any ditch, dam or reservoir; and he has such control of the location of ditches and gates as may be necessary to secure the most equitable distribution of the water among all entitled to its use.

1887 R. S. Sec. 3204; 1881, 11 Ses. p 275, Sec. 5.

**Section 2631. Duty of County Commissioners as to Distribution:** In order to the proper and certain ascertainment and distribution of the amount of water appropriated by means of any community ditch, conduit or other works for the diversion or carriage of water, and to provide for the proper distribution of the same according to the several rights of the parties entitled to the use thereof, it shall be the duty of the board of county commissioners of the proper county, upon the application of any one or more appropriators of water, using the same community ditch or conduit, to cause to be placed at the expense of the owners of said community ditch or conduit at the point or points of said intended use or diversion, a headgate with measuring weir or device so that each and every one of said appropriators may know how much water is flowing, not only through the headgate of said canal, ditch or conduit, but also how much water is flowing in and through said ditch upon the land of the several appropriators using the same community ditch, canal or conduit.

1899 5th Ses. p. 386, Sec. 33.

**Section 2632. Wrongful Diversion of Water; Damages:** Any person who, without the consent of the watermaster of the district, diverts any water from the ditch or channel where it was placed, or caused, or left to run by the watermaster or his deputies, or who shuts or opens any ditch, gate or dam with intent so to divert any water, and thereby deprive any person of the use of the same during any part of the time he is entitled to such use, or who, without the consent of the watermaster, cuts any ditch or the banks thereof, or breaks or destroys any gate or flume is liable in a civil action to any person injured thereby in three times the actual damage sustained in consequence of any such wrongful act or acts.

1887 R. S. Sec. 3205; 1881, 11th Ses. p. 275, Sec. 6.

## IRRIGATION DISTRICTS.

**Section 2633. Who May Form a District:** Whenever fifty, or a majority of the holders of title, or evidence of title to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this Subdivision, and when so organized, such district shall have the powers conferred, or that may be hereafter conferred by law, upon such irrigation districts. *Provided*, Said holders of title or evidence of title shall hold such title or evidence of title to at least one-fourth part of the total area of the land in the proposed district, which will be assessable for the purposes of the district under the operations of this Subdivision. The equalized county assessment roll next preceding the presentation of a petition, for the organization of an irrigation district, shall be sufficient evidence of title for the purposes of this Subdivision.

1899 5th Ses. p. 408, Sec. 1.

**Section 2634. Petition for District and Proceedings Thereon:** A petition shall first be presented to the board of county commissioners, signed by the required number of holders of title or evidence of title, (and to at least one-fourth part of the total assessable area) of such proposed district, evidenced as provided in Section 2633, which petition shall set forth and particularly describe the proposed boundaries of the district, and shall pray that the same may be organized under the provisions of this Subdivision. The petitioners must accompany the petition with a map of the proposed district.

Said map shall show the location of the proposed canal or other works by means of which it is intended to irrigate the proposed district, and of all the canals situated within the boundaries of the proposed district. If said water supply be from natural streams, the flow of said stream or streams shall be stated in terms of cubic feet per second. Said flow shall be given for, and shall state the length of, the period of extreme low water in said stream or streams. If the water supply for said proposed district is to be gathered by storage reservoirs, said map shall show the location of said proposed reservoirs, and shall give their capacity in acre feet. Said map shall be drawn to a scale of two inches to the mile. Cross sections of the proposed canal and all canals existing within the boundaries of said proposed district, and of all proposed dams and embankments, shall be given in sufficient number to show the contemplated mode of construction, and the capacity shall be given in cubic feet per second of the proposed and said existing canals. Such cross sections shall be drawn to a scale of ten feet to the inch, and said map and cross sections, together with an estimate of the costs of such works, shall be certified to by a well-known and competent irrigation engineer. The petitioners must also accompany the petition with a good and sufficient bond, to be approved by the said board of county commissioners, in double the amount of the probable cost of organizing such district,



conditioned that the bondsmen will pay all said costs, in case said organization be not effected. Such petition shall be presented at a regular meeting of said board, and shall be published for at least three weeks before the time at which the same is to be presented, in some newspaper printed and published in the county, in which said proposed district is situated, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of such proposed district lie within another county or counties, then said petition and notice shall be published in a newspaper published in each of said counties. When such petition is presented, the said board shall set a time for a hearing upon the same, which time shall not be less than thirty nor more than sixty days from the date of its said presentation. A notice of the time of such hearing shall be published by said board, at least fifteen days before the time of such hearing, in a newspaper published within the county in which said district is proposed to be organized; and if any portion of said district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties.

A copy of such map, estimate and description of such boundaries shall be filed in the office of the State engineer at least sixty days before the date set for such hearing by the board of county commissioners. It shall be the duty of said State engineer to critically examine such map, estimate and description of said boundaries, and if he shall deem necessary to verify the same by a careful examination of the proposed district and the site of the proposed works; and he shall prepare a report which shall discuss the water supply of the proposed district and the feasibility of the plans submitted for the reclamation of the lands thereof, and all other features pertaining to the irrigation of the proposed district.

The State engineer shall submit said report to the board of county commissioners at the meeting set for the hearing of said petition for organization.

Whenever the State engineer shall after having critically examined the plans of said petitioners and looked into all that pertains to the reclamation of the lands of the proposed district, report to the board of county commissioners against the organization of such district, said board of county commissioners shall refuse to further consider such petition.

1901 6th Ses. p. 191, first part Sec. 2.

**Section 2635. Petition Open to Public Inspection. Method of Describing Boundaries:** The petition, together with all maps, cross sections, and papers filed therewith, shall, at all proper hours, be open to public inspection at the office of the clerk of the board of county commissioners between the date of their said filing and the date of the said final hearing thereon: *Provided, also,* That in establishing and defining the boundaries of said proposed district, said board shall describe said boundaries in all cases by the legal subdivision lines of the United States surveys, if such surveys exist, or by the meander notes of survey through any such legal sub-

division, with proper connections with established United States survey corners, and the area of any such fractional subdivision must in all cases be stated in order of the said board establishing and defining said boundaries. If any portion of said boundaries is across unsurveyed land, the courses and distances of the meander of such portion of said boundaries shall be given with connections, with United States survey corners, from each end of said meander line. A map giving all the information required by this section, in regard to the description of the said boundaries may be attached to the description of said boundaries in lieu of such detailed description, and when so attached, said map shall form a part of said description. The object of the above provision is to enable every land owner along said boundaries to ascertain from said description what part, if any, of his land is included within the said proposed district and indefinite descriptions of boundaries of said proposed district shall in no case be made in the order of said board of county commissioners establishing and defining them and said board shall have power to postpone the establishment and defining of said boundaries, as herein provided, till such time as the petitioners shall furnish sufficient information to enable it to do so conformable to the provisions of this Section.

1899 5th Ses. p. 410, portion of Sec. 2.

**Section 2636. May Adjourn Meeting. Land Included, Notice of Election:** When the State engineer shall approve of the organization of such irrigation district said board of county commissioners may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing make such changes in the proposed boundaries as they may find proper and as are approved by the State engineer, and shall establish and define such boundaries.

*Provided,* That said board shall not modify said boundaries so as to except from the operation of this Subdivision any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district; nor shall any lands which will not, in the judgment of said board, be benefited by irrigation by said system be included within such district.

*Provided,* That any Person whose lands are susceptible of irrigation from the same source, may, in the discretion of the board, upon application of the owner to said board, have such land included in said district. Said board shall also make an order dividing said district into five divisions, of as nearly equal size as may be practicable, which shall be numbered first, second, third, fourth and fifth; and one director, who shall be a freeholder in the division, and an elector, and resident of the district shall be elected by each division.

*Provided,* That if a majority of the holders of title or evidence of title, evidenced as in this Subdivision provided, petition for the formation of a district, and if said petition be granted, the board of county commissioners may, if so requested in the petition, order that there may be either three or five directors, as said board may order



for such district, and that they may be elected by the district at large. Said board shall then give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of this Subdivision. Such notices shall describe the boundaries so established, and shall designate a name for such proposed district, and said notice shall be published for at least five weeks prior to such election, in a newspaper published within said county; and if any portion of such district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots which shall contain the words "Irrigation District—Yes" or "Irrigation District—No," or words equivalent thereto, and also the names of the persons to be voted for to fill the various elective offices hereinafter prescribed.

1901, 6th Ses. p. 193, portion of Sec. 2.

**Section 2637. Election Precincts, Appointment of Registrars:** For the purpose of the election above provided for, the board of county commissioners must establish a convenient number of election precincts in said proposed district, and define the boundaries thereof, which said precincts may hereafter be changed by the board of directors of such district. At the time of making said order said board of county commissioners shall appoint a registrar for each precinct so established, who shall have the same powers and shall perform the same duties and receive the same compensation as registrars under the general election laws of the State, but there shall be added to the usual electors oath the following words, "and I am a resident and owner of land within the boundaries of the . . . . . irrigation district:" *Provided, however,* That for all subsequent elections the board of directors of the district shall appoint such registrars and election officers.

1899 5th Ses. p. 410, 411, portions of Sec. 3.

**Section 2638. Election, How Conducted, Qualifications of Voters:** Such election shall be conducted as nearly as practicable, in accordance with the general laws of the State: *Provided,* That no particular form of ballot shall be required, and that the provisions of the election laws as to the form of ballots shall not apply. No person shall be entitled to a vote at any election held under the provisions of this Subdivision, unless he shall possess all the qualifications required of electors under the general election laws of the State, and be a holder of land and a resident in the proposed district.

1899 5th Ses. p. 410, portion of Sec. 3; 1901, 6th Ses. p. 191, portion Sec. 2.

**Section 2639. Canvassing Vote and Declaring Result, Organization of District:** Immediately after any election, for voting upon the organization of an irrigation district, the judges of said election shall forward the official results of said election to the clerk of the board of county commissioners. The said board of county commissioners shall meet within ten days after the returns are received, and shall proceed to canvass the votes cast thereat,

and if upon canvass it appears that two-thirds of the votes cast are "Irrigation District—Yes," the said board shall, by an order entered on its minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for such several offices to be duly elected to such offices. And no action shall be commenced or maintained or defense made affecting the validity of the organization, unless the same shall have been commenced or made within two years after the making and entering of said order. Said board shall cause a copy of such order, duly certified to be immediately filed for record in the office of county recorder of each county in which any portion of such lands are situated. If it shall appear, however, that more than one-third of said votes are "Irrigation District—No," then a record of that fact shall be duly entered upon the minutes of said board, and all proceedings in regard to the organization of said district shall be void, and the expenses properly incurred thereunder may be collected on the bond provided for in Section 2634. From and after the date of such filing of said order of the board of county commissioners the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying with the law, and shall hold such offices, respectively, until their successors are elected and qualified. The board of directors so elected shall meet within thirty days after said organization of the district, and shall elect a president, and appoint a secretary and a treasurer, who shall perform the duties imposed upon such officers under this Subdivision. Persons who are not residents of this district may, in the discretion of the board of directors be appointed to the office of secretary or treasurer. The treasurer appointed under the operation of this Subdivision, shall execute an official bond in the sum of thirty thousand dollars; said bond to be approved by the board of directors of the district. *Provided*, That when the amount of money in the hands of the said treasurer at any time exceeds the sum of thirty thousand dollars, said board of directors shall require an additional bond in a sum, at least double the amount of money in the hands of said treasurer, in excess of said thirty thousand dollars. In any district the board of directors thereof may, upon the presentation of a petition therefor by a majority of the holders of title or evidence of title of said district, evidenced as above provided, order that on and after the next ensuing general election there shall be either three or five directors, as said board may order; and that they shall be elected by the district at large or by divisions, as so petitioned and ordered, and after such order such directors shall be so elected.

1899 5th Ses. p. 410, 411, portions of Sec. 3.

**Section 2640. Annual Election of Directors; Official Oath and Bond:** An election shall be held in each district on the second Tuesday in January, nineteen hundred and one and on the second Tuesday in January in each second year thereafter, at which a board of directors for the district shall be elected. The person re-



ceiving the highest number of votes for any office to be filled in such election, is elected thereto, and shall hold office from the first Tuesday in February next after for two years, and until his successor is elected and qualified. Within ten days after receiving the certificates of election hereinafter provided for, such officer shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the probate court of the county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board. All official bonds provided for in this Subdivision shall be in the form prescribed by law for the official bonds of county officers.

1899 5th Ses. p. 411, Sec. 4.

**Section 2641. Notice of Election. Appointment of Judges of Election:** At least thirty days before any election held under the provisions of this Subdivision, subsequent to the organization of any district, the secretary of the board of directors shall cause notices to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place, to be determined by said board, specifying the polling places of each precinct. Prior to the time of posting the notices, the board must appoint for each precinct from the electors thereof, three judges of the election, who shall constitute a board of election for such precinct. If the board shall fail to appoint a board of election, or the members appointed do not attend at the opening of the polls on the morning of the election, the electors of the precinct present at that hour may appoint the board, or supply the place of the absent member thereof. The board of directors must, in its order appointing the board of election, designate the house or place within the precinct where the election is to be held.

1899 5th Ses. p. 412, portion of Sec. 5.

**Section 2642. Appointment of Registrars. Duties of:** At the time of appointing such election board, said board of directors shall appoint a registrar for each precinct of the district, except the precinct in which the office of the secretary of the board is located. In the precinct in which his office is located (or where there is but one voting precinct in the district) the secretary of the board of directors of the district shall act as registrar. The registrars appointed under the provisions of this Subdivision shall be governed in the performance of their duties by the general election laws of the State so far as they are applicable; and must be at their places of registration to receive applications for registration, from nine o'clock a. m. to nine p. m., on each of the three Saturdays next preceding the date of election.

In addition to the usual elector's oath, the following shall be added,

"And I am a resident in, and owner of land within the boundaries of.....Irrigation District."

No regular or special election for any purpose shall be held in any irrigation district without such registration, and only those persons duly registered shall be allowed to vote thereat.

1899 5th Ses. p. 412, portion of Sec. 5.

**Section 2643. Duties of Judges of Election:** The said judges shall elect a chairman of the board, who may

First. Administer all oaths required in the progress of an election.

Second. Appoint judges and clerks, if, during the progress of an election, any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of the election. The board of election of each precinct, must before opening the polls, appoint two clerks to act as clerks of election. Before opening the polls, each member of the board and each clerk must take and subscribe an oath to faithfully perform the duties imposed upon him by law. Any elector of the precinct may administer and certify such oath. The polls must be opened one hour after sunrise on the morning of election, and be kept open until sunset, when the same must be closed. The provisions of the Political Code, and all acts amendatory and supplementary thereof concerning the form of ballots to be used, shall not apply to elections held under this Subdivision.

1899 5th Ses. p. 412, Sec. 6.

**Section 2644. Conduct of Elections:** Voting may commence as soon as the polls are open and may continue during all the time the polls remain open, and shall be conducted as nearly as practicable in accordance with the provisions of Chapter XXV of the Political Code. As soon as the polls are closed, the judges shall open the ballot box and shall commence counting the votes; and in no case shall the ballot box be removed from the room in which the election is held until all the ballots have been counted. The counting of the ballots shall in all cases be public. The ballots shall be taken out one by one, by the chairman of the board of election or one of the judges, who shall open them and read aloud the name of each person contained thereon, and the office for which every such person is voted for. Each clerk shall write down each office to be filled, and the name of each person voted for for such office, and shall keep the number of votes by tallies, as they are read by such chairman or judge. The counting of the votes shall continue without adjournment till all the votes shall have been counted.

1899 5th Ses. p. 413, Sec. 7.

**Section 2645. Return of Election to Secretary of Board of Directors:** As soon as all the votes are read off and counted, a certificate shall be drawn up on each of the papers containing the poll list and tallies, or attached thereto, stating the number of votes each one voted for has received, and designating the office to fill which he was voted for, which number shall be written in words



and figures at full length. Each certificate shall be signed by all the members of the board of election and by both clerks. One of said certificates, with the poll list and tally paper to which it is attached, shall be retained by the chairman of the board of election, and reserved by him for at least six months. The ballots shall be strung on a cord or thread by the said chairman, during the counting thereof, in the order in which they are entered upon the tally list by the clerks; and said ballots together with the other of said certificates, with the poll lists and tally paper to which it is attached, shall be sealed by the said chairman in the presence of the other judges, and the clerks, and endorsed "election returns of (naming precinct) precinct," and be directed to the secretary of the board of directors, and shall be immediately delivered by said chairman, or by other safe and responsible carrier designated by him, to said secretary, and the ballots shall be kept unopened for, at least six months, and if any person be of the opinion that the vote of any precinct has not been correctly counted he may appear on the day appointed for the board of directors to open and canvass the returns and demand a recount of the precinct that is claimed to have been incorrectly counted.

1899 5th Ses. p. 413, Sec. 8.

**Section 2646. Canvass of Returns by Board of Directors:** No list, tally paper or certificate returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after each election to canvass the returns. If, at the time of the meeting, the returns of each precinct in which polls have been opened have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until all the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and estimating the vote of the district for each person voted for, and declaring the result thereof.

1899 5th Ses. p. 413, Sec. 9.

**Section 2647. Statement of Result, What Must Show; Certificate of Election:** The secretary of the board of directors must, as soon as the result is declared, enter on the records of such board a statement of such result, which statement must show:

First. The whole number of votes cast in the district and each division of district.

Second. The names of the persons voted for.

Third. The office to fill which each person was voted for.

Fourth. The number of votes given in each precinct to each of such persons.

Fifth. The number of votes given in each division for the office of director.

The board of directors must declare elected the persons having the highest number of votes given for each office. The secretary must,

immediately, make out and deliver to such persons a certificate of election, signed by him and authenticated with the seal of the board. In case of a vacancy in the office of directors the vacancy shall be filled by appointment by the board of county commissioners, from the division in which the vacancy occurred. An officer appointed as above provided shall hold his office until the next regular election for said district, and until his successor is elected and qualified.

1899 5th Ses. p. 414, Sec. 10.

**Section 2648. When Board to Organize. Duties:**

On the first Tuesday in February next following their election, the board of directors shall meet and organize as a board, elect a president from their number, and appoint a secretary and a treasurer, who shall each hold office during the pleasure of the board. As soon as the proper surveys shall have been made to determine the cost of the works necessary for the irrigation of the lands of the district, the board of directors shall examine, critically, each tract or legal subdivision of land in said district with a view of determining the benefits which will accrue to each of such tracts or subdivisions from the construction or purchase of such irrigation works; and the cost of such work shall be apportioned or distributed over such tracts or subdivisions of land in proportion of such benefits accruing thereto and the amount so apportioned or distributed to each of said tracts or subdivisions shall be and remain the basis for fixing the annual assessment levied against such tracts or subdivisions in carrying out the purpose of this Chapter. Such board of directors shall make, or cause to be made, a list of such apportionment or distribution, which list shall contain a complete description of each subdivision or tract of land of such district with the amount and rate per acre of such apportionment or distribution of cost, and the name of the owner thereof; and shall prepare a map on a convenient scale showing each of such subdivisions and tracts with the rate per acre of such apportionment of such costs entered thereon. Said list and map shall be made in duplicate, and one copy of each shall be filed in the office of the State engineer at the time of filing estimates and plans in said office, and one copy of each shall remain in the office of said board of directors for public inspection, along with maps, reports, and estimates as provided in Section 2653: *Provided*, That the proceedings of said board of directors in making such apportionment of cost and the said list of such apportionment shall be included, with other features of the organization of such district which are subject to judicial examination and confirmation as provided in Sections 2656 to 2660 inclusive. The board shall have the power and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required, and to prescribe their duties establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said land as may be necessary and just, to secure the just and proper distribution of the same. Said by-laws, rules and regulations must be printed in convenient form for distribution throughout the district.



Said board shall perform all such acts as shall be necessary to fully carry out the purposes of this Subdivision.

1901, 6th Ses. p. 194, Sec. 2.

**DUTIES OF BOARD:** After an irrigation district was organized and the boundaries determined and trustees elected, such trustees could not arbi-

trarily assume the management of one part and reject another part of the district.—Harris v. Tarbet, (Utah) 57 Pac. 33.

**Section 2649. Regular and Special Meetings. Quorum:** The board of directors shall hold a regular monthly meeting in their office, on the first Tuesday in every month, during the irrigation season, and such special meetings as may be required for the proper transaction of business: *Provided*, That all special meetings must be ordered by the majority of the board. The order must be entered of record, and five days' notice thereof must, by the secretary, be given to each member not joining in the order. The order must specify the business to be transacted, and none other than that specified must be transacted at such special meeting. All meetings of the board must be public, and a majority shall constitute a quorum for the transaction of business; but, on all questions requiring a vote, there shall be a concurrence of at least a majority of the members of the board. All records of the board shall be open to the inspection of any elector during business hours.

1899 5th Ses. p. 414, portion of Sec. 12.

**Section 2650. Entry upon Land. Acquiring Right of Way:** The board and its agents and employees shall have the right to enter upon any land, to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire either by purchase, condemnation or other legal means, all lands and waters and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvements of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used to their par value in payment. Said board may also construct the necessary dams, reservoirs and works for the collection of water for said district; and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this Subdivision, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this Subdivision, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law.

1899 5th Ses. p. 415, portion of Sec. 12.

**Section 2651. Legal Title to Property Vests in**

**District:** The legal title to all property acquired under the provisions of this Subdivision shall immediately and by operation of law, vest in such irrigation district, and shall be held by such district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this Subdivision. And said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided.

1899 5th Ses. p. 415, Sec. 13.

**Section 2652. May Take Conveyances and Maintain Actions:** The said board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the uses and provisions of this Subdivision in the name of such irrigation district, to and for the purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this Subdivision or to enforce, maintain, protect or preserve any and all rights, privileges, and immunities created by this Subdivision or acquired in pursuance thereof. And in all courts, actions, suits or proceedings, the said board may sue, appear, and defend, in person or by attorneys, and in the name of such irrigation district.

1899 5th Ses. p. 415, Sec. 14.

**Section 2653. Constructing Canals. Duties of State Engineer and Board of Directors:** For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and the rights therefor, and otherwise carrying out the provisions of this Subdivision, the board of directors of any district must, as soon after such district has been organized as may be practicable, formulate a general plan for such construction and acquisition of such property, and shall cause such surveys, examinations and plans to be made as shall demonstrate the practicability of such plan and furnish the proper basis for an estimate of the cost of carrying out said plan. All such surveys, examinations, maps, plans and estimates, shall be made under the direction of an irrigation engineer of well known standing and competency, and all such necessary surveys, examinations, maps, plans and estimates must be certified to by him. When all such are completed and the results in the hands of the said board of directors, said board shall submit a copy of its said plan, together with the proper field notes of all such said surveys and examinations and all such said maps, plans and estimates, to the State engineer for examination and report. As soon as possible and within ninety days from the date said field notes, maps, plans and estimates are submitted to him, the State engineer shall make a written report upon the whole subject to the said board, which report shall include a discussion of the said plans submitted to him by said board, of the question of water supply, of the sufficiency of the works proposed to accomplish the desired results, of the practicability of the proposed system from an engineering standpoint, of the probability of its being acquired and constructed within the estimate of cost stated,



and such general discussion and recommendations in regard to the engineering and financial features of the whole matter as in the judgment of the State engineer may be desirable for the information of the people of said district. Said report shall be accompanied by a map when such is necessary for a proper explanation or understanding of the same. Upon receiving said report said board of directors shall proceed to determine the amount of money necessary to be raised; and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this Subdivision, the question whether or not the bonds of said district in the amount as determined shall be issued. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least thirty days, and also by the publication of such notice in some newspaper published in the county where the office of the directors of such district is kept, once a week for at least four successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued, and shall state that maps and estimates and said report of the state engineer are on file and open to public inspection by the people of the district, at the office of the said board, and at the office of the state engineer at the State Capitol.

1899 5th Ses. p. 415, portion of Sec. 15.

**Section 2654. Conduct of Election. Result:** Said election must be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this Subdivision governing the election of officers: *Provided*, That no informalities in conducting such an election shall invalidate the same if the election shall have been otherwise fairly conducted. At such elections the ballots shall contain the words "Bonds—Yes" or "Bonds—No" or words equivalent thereto. If two-thirds of the votes cast are "Bonds—Yes," the board of directors shall cause bonds in said amount to be issued; if more than one-third of the votes cast at any bond election are "Bonds—No," the result of such election shall be so declared and entered of record. And whenever thereafter said board in its judgment deems it for the best interest of the district that the question of the issuance of bonds in said amount, or any other amount, shall be submitted to the electors, it shall declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election.

1899 5th Ses. p. 416, portion of Sec. 15.

**Section 2655. Bonds, When and How Payable:** Said bonds shall be payable in money of the United States, in ten series as follows, to-wit: At the expiration of eleven years, five per cent. of the whole number of said bonds; at the expiration of twelve years, six per cent.; at the expiration of thirteen years, seven per cent.; at the expiration of fourteen years, eight per cent.; at the expiration of fifteen years, nine per cent.; at the expiration of sixteen years, ten per cent.; at the expiration of seventeen years, eleven per cent.; at

the expiration of eighteen years, thirteen per cent.; at the expiration of nineteen years, fifteen per cent.; at the expiration of twenty years, sixteen per cent.; and shall bear interest at a rate not to exceed seven per cent. per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than five hundred dollars; shall be negotiable in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. Each issue shall be numbered consecutively as issued, and the bonds of each issue shall be numbered consecutively, and bear date at the same time of their issue. Coupons for the interest shall be attached to each bond signed by the secretary. Said bonds shall express on their face that they were issued by authority of this Subdivision, stating its title and date of approval, and shall also state the number of the issue of which such bonds are a part. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds be insufficient for the completion of the plan and works adopted and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessment therefor: *Provided*, The board of directors of said irrigation district shall commence a special proceeding, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of bonds of said district, whether said bonds or any of them have or have not been sold, may be judicially examined, approved and confirmed.

1899 5th Ses. p. 416, portion of Sec. 15.

**Section 2656. Petition to Test Legality of Bonds:**

The board of directors of the irrigation district shall file in the district court of the county in which the lands of the district or some portion thereof are situated, a petition, praying in effect that the proceedings aforesaid may be examined, and approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected; but the petition need not state the facts showing such organization of the district or the election of said first board of directors.

1899 5th Ses. p. 417, Sec. 16.

**Section 2657. Notice of Hearing to be Published by Clerk, How:**

The court shall fix the time for hearing of said petition, and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published in the same manner, and for the same length of time that the notice of a special election provided for by this Subdivision, to determine whether the bonds of said district shall be issued, is required to be given and published. The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition,



and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors..... irrigation district (giving its name) praying that the proceeding for the issue and sale of the bonds of said district may be examined, approved and confirmed by said court.

1899 5th Ses. p. 417, Sec. 17.

**Section 2658. Who May Demur or Answer. Provisions of Code of Civil Procedure Apply:** Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition. The provisions of the Code of Civil Procedure respecting the demurrer and the answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring to or answering said petition shall be the defendants to said special proceedings, and the board of directors shall be plaintiff. Every material statement of the petition not specifically controverted by the answer, must for the purpose of said special proceeding be taken as true; and each person failing to answer the petition shall be deemed to admit as true all the material statements of the petition. The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this Subdivision, are applicable to the special proceeding herein provided for. A motion for a new trial must be made upon the minutes of the court. The order granting a new trial must specify the issues to be re-examined on such new trial, and the findings of the court upon the other issues shall not be affected by such order granting a new trial.

1899 5th Ses. p. 417, Sec. 18.

**Section 2659. What Court Must Hear and Determine:** Upon the hearing of such special proceeding, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of the proceedings for the organization of said district under the provisions of this Subdivision, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale, and the sale thereof. The court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said special proceeding; and it may approve and confirm such proceedings in part and disapprove and declare illegal or invalid other and subsequent parts of the proceedings. The court shall find and determine whether the notice of the filing of said petition has been duly given and published for the time and in the manner in this Subdivision prescribed. The cost of the special proceedings may be allowed and apportioned between all the parties, in the discretion of the court.

1899 5th Ses. p. 418, Sec. 19.

**Section 2660. Appeal Must be Taken in Thirty Days:**

An appeal from an error granting or refusing a new trial, or from the judgment, must be taken by the party aggrieved within thirty days after the entry of said order or said judgment.

1899 5th Ses. p. 418, Sec. 20.

**Section 2661. Method of Selling Bonds, Notice of**

**Sale:** The board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous; to raise money for the construction of said canals and works, the acquisition of said property and rights and otherwise to fully carry out the objects and purposes of this Subdivision. Before making any sale the board shall, at a meeting, by resolution, declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolutions to be entered on the minutes, and notice of sale to be given by publication thereof at least sixty days in three newspapers published in the State of Idaho, one of which shall be a newspaper published in the county in which the office of the board of directors is situated, if there be a newspaper published in said county, and in any other newspaper at their discretion. That notice shall state that sealed proposals will be received by the board at their office for the purchase of the bonds till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder, or may reject all bids; but said board shall in no event sell any of the said bonds for less than the par or face value thereof.

1899 5th Ses. p. 418, Sec. 21.

**Section 2662. Bonds and Interest, How Paid:** Said bonds and the interest thereon shall be paid by revenue derived from the annual assessment upon the land in the district, and all the land in the district, shall be and remain liable to be assessed for such payments on the basis determined in the manner provided in section 2648.

1901, 6th Ses. p. 195, Sec. 3.

**Section 2663. Preparation of Assessment Book:**

Said board of directors shall, before August 15th of each year cause to be prepared an assessment book, containing a full and accurate list and description of all the land in the district, and a list of the persons who own, claim, have possession, or control thereof during said year, giving the number of acres listed to each person. If the name of the person owning, claiming, possessing, or controlling any tract of said land is not known, it shall be listed to "unknown owners."

1899 5th Ses. p. 419, Sec. 23.

**Section 2664. Notice of Meeting to Correct Assessments:** On or before the first Monday in September in each year, the secretary of the board must give notice of the time the board of directors will meet to correct assessments, by publication in a newspaper published in each of the counties comprising the district. The



time fixed for the meeting shall not be less than twenty, and not more than thirty days from the first publication of the notice; and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested.

1899 5th Ses. p. 419, Sec. 24.

**Section 2665. Meeting to Correct Assessment:** Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is here constituted a board of correction for that purpose, shall meet and continue in session from day to day, as long as may be necessary, not to exceed ten days, exclusive of holidays, and may make such changes in said assessment book as may be necessary to make it conform to the facts. Within five days after the close of said session, the secretary of the board shall have the corrected assessment book complete.

1899 5th Ses. p. 419, Sec. 25.

**Section 2666. Levy of Assessment, When Made, Amount:** At its regular meeting in October, the board of directors shall levy an assessment upon the basis as determined in the manner provided in section 2648 sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book, the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the "Bond Fund of ..... Irrigation District."

1901, 6th Ses. 196, Sec. 4.

**Section 2667. Assessment is Lien Against Property:** The assessment is a lien against the property assessed from and after the first Monday in March for any year and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof.

1899 5th Ses. p. 419, Sec. 27.

**Section 2668. Notice of Assessment, When Assessment Delinquent:** On or before the first day of November, the secretary must deliver the assessment book to the treasurer of the district, who shall within ten days publish a notice in a newspaper published in each county in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at 6 o'clock p. m. on the first Monday of January next thereafter, and also the times and places at which payments of assessments may be made, which notice shall be published for the period of two weeks. The treasurer must attend at the times and places specified in the notice, to receive assessments, which must be paid in lawful

money of the United States; he must make the date of payment of any assessment in the assessment book, opposite the name of the person paying and give a receipt to such person, specifying the amount of the assessment and the amount paid with a description of the property assessed. On the first Monday in January at 6 o'clock p. m. of each year, all unpaid assessments for the preceding year are delinquent.

1899 5th Ses. p. 419, Sec. 28.

**Section 2669. Delinquent List, How Published. Collection of Delinquent Taxes; Sale of Property for Taxes:**

On or before the second Monday in January in each year, said treasurer of the district shall furnish the assessor and collector of the county in which said land is situated, a properly certified delinquent list, containing a description of all tracts of land upon which the assessments are delinquent and the amount of assessment against each such tract, and the name or names of the person or persons as shown on the assessment book as being the owner or owners thereof. Said county assessor and collector shall publish said delinquent list at the same time and in the same manner as the county delinquent tax list for the preceding year, published by him as required by law, and said county assessor and collector shall collect the amounts of said delinquent list in the same manner and with the same penalties, costs, and interest charges added as is provided by law for the collection of the amounts of the delinquent state and county taxes, and all procedure in regard to said collection of said delinquent assessments (including sale and deeding of the land against which the assessment stands) shall, as far as applicable, be in accordance with the provisions of the law in regard to such proceedings in the case of delinquent county taxes.

*Provided,* A redemption of any land sold for delinquent district assessments may be made by any party in interest within one year from the date of purchase.

*Provided, further,* That in case any such land is not otherwise sold as provided by law, it shall be struck off to the irrigation district to which the assessment for which it is thus sold is due, instead of to the county. Any irrigation district as a purchaser of any land at any such delinquent tax sale shall be entitled to the same rights as a private purchaser, and the title so acquired by the district, subject to the right of redemption herein provided, may be conveyed by deed, executed and acknowledged by the president and secretary of said board:

*Provided,* That authority to so convey must be conferred by resolution of the board, entered on its minutes, fixing the price at which such sale may be made, and such conveyance shall not be made for a less sum than the reasonable market value of such property.

1899 5th Ses. p. 420, Sec. 29.

COUNTY TAXES: Political Code,  
COLLECTION OF STATE AND Chap. LVI.

**Section 2670. Delinquent List to be Published Separately:** Said county assessor and collector shall publish said dis-



trict delinquent list separate from the list of delinquent county taxes, and when paid he shall give a separate receipt therefor.

1899 5th Ses. p. 421, Sec. 31.

**Section 2671. Assessor Must Pay Money to District Treasurer:** All money collected by the assessor and collector on any such delinquent assessment list, less his actual expenses for collecting the same, shall be by him turned over to the treasurer of the proper irrigation district, in the same manner as is by law provided for the turning over of money received on county delinquent tax collections to the county treasurer. Said county assessor and collector shall be liable, on his official bond as such officer, for failure to properly perform the duties imposed upon him by this Subdivision.

1899 5th Ses. p. 421, portion of Sec. 30.

**Section 2672. Deed, Contents of. Deed and Delinquent List as Evidence:** All certificates and deeds to land for delinquent assessments shall be issued in the manner provided in case of sales for delinquent county taxes, and any such deed shall set forth the fact that the land was assessed as required by law, that the assessment was not paid, and that at the proper time and place the land was sold by the county assessor and collector as provided by law, that the land was not redeemed, and that the officer executing the deed is the proper officer.

Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment inclusive, up to the execution of the deed: The deed conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned by the United States or this State, in which case it is prima facie evidence of the right of possession.

The delinquent list, certified by the treasurer, showing unpaid assessments against any person or property is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of assessments due and unpaid, and that all the forms of the law in relation to the assessment and levy of such assessments have been complied with.

1899 5th Ses. p. 420, portion of Sec. 30.

SALES FOR DELINQUENT TAXES:  
Secs. 1410, et seq. Political Code.

**Section 2673. Redemption of Bonds:** Upon the presentation of the coupons due to the treasurer, he shall pay the same from said bond fund. Whenever, after ten years from the issuance of said bonds, said fund shall amount to the sum of ten thousand dollars, the board of directors may direct the treasurer to pay such an amount of said bonds not due as the money in said fund will redeem at the lowest value at which they may be offered for liquidation, after advertising for at least four weeks in some newspaper published in the county, and in any other newspapers which said board may deem advisable, for sealed proposals for the redemption of said bonds. Said proposals shall be opened by the board in open

meeting, at a time to be named in the notice, and the lowest bid for said bonds must be accepted: *Provided*, That no bond shall be redeemed at a rate above par. In case the bids are equal, the lowest numbered bonds shall have the preference. In case none of the holders of said bonds shall desire to have the same redeemed, as herein provided for, said money shall be invested by the treasurer, under the direction of the board, in United States bonds, or the bonds or warrants of the State, which shall be kept in said "bond fund" and may be used to redeem said district bonds whenever the holders thereof may desire.

1899 5th Ses. p. 421, Sec. 32.

**Section 2674. Advertising for Bids for Construction:**

After adopting a plan for said canal or canals, storage reservoirs, and works, the board of directors shall give notice, by publication thereof, of not less than thirty days in one newspaper published in each of the counties comprising the district (provided a newspaper is published therein), and in such other newspapers as they may deem advisable, calling for bids for the construction of such work, or any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice. Said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and place for opening said proposals, which, at the time and place appointed, shall be opened in public; and as soon as convenient thereafter the board shall let said work, either in portions, or as a whole, to the lowest responsible bidder; or they may reject any and all bids and re-advertise for proposals. Contracts for the purchase of the material shall be awarded to the lowest responsible bidder.

1899 5th Ses. p. 421, portion of Sec. 33.

**Section 2675. Letting Contracts: Bond of Contractor:**

Any person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties to be approved by the board, payable to said district for its use, for twenty-five per cent. of the amount of the contract price, conditioned upon the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the state engineer, and approved by the board. *Provided*, That no contract of any kind shall be let by said board of directors unless there is sufficient money in the district treasury at the time such contract is let and available for such payment, to fully pay for the work or material so contracted for.

1899 5th Ses. p. 422, portion of Sec. 33.

**Section 2676. Board has Power to Construct Across Highways, Etc.:** The board of directors shall have power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross, in such a manner as to af-



ford security for life and property; but said board shall restore the same when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have unnecessarily impaired its usefulness: and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings and grant the privileges aforesaid; and if such railroad company and said board, or the owners and controllers of the said property, thing or franchise to be crossed, cannot agree upon the amount to be paid therefor, or upon the points or the manner of said crossings or intersections, the same shall be ascertained and determined in all respects as herein provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now or may be the property of the State.

1899 5th Ses. p. 422, Sec. 36.

**Section 2677. Specific Expenses, How Paid:** The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund. For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair and improvement of such portion of said canal and works as are completed and in use, including salaries of officers and employees, the board may either fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation and other purposes, or they may provide for the payment of said expenditures by a levy of assessments therefor or by both tolls and assessments; if by the latter method, such levy shall be made on the completion and correction of the assessment roll. The procedure for the levying, and for the collection of the assessments by such levy, shall in all respects conform to the provisions of this Subdivision relating to the payment of principal and interest of bonds herein provided for.

1899 5th Ses. p. 422, Sec. 35.

**Section 2678. All Claims Must be Allowed by the Board:** No claim shall be paid by the treasurer until allowed by the board, and only upon a warrant signed by the president, and countersigned by the secretary.

1899 5th Ses. p. 422, Sec. 34.

**Section 2679. Annual Examination and Report by State Engineer:** At least as often as at the end of each year after this organization, the state engineer, shall make a careful investigation of the condition of each irrigation district organized under the provisions of this Subdivision; and shall report thereon to the boards of directors of said districts. Said report shall state the condition of the work of construction, as to capacity, stability, and permanency, and whether or not the plan of irrigation formulated under the provisions of this Subdivision, is being properly and judiciously

carried out, and whether or not, in his opinion, the funds available will complete the proposed work. In such report the state engineer shall state such facts, and make such suggestions and recommendations, to said boards of directors, as he may deem advisable for the best interests of the districts.

1899 5th Ses. p. 422, Sec. 37.

**Section 2680. Fees of Officers, How Fixed:** The members of the board of directors shall each receive not more than three dollars per day for each day spent attending the meetings, or while engaged in official business under the order of the board. The board shall fix the compensation to be paid to the other officers named in this Subdivision; to be paid out of the treasury of the district; *Provided*, That said board, shall upon the petition of fifty, or a majority of the freeholders within such district, submit to the electors at any general election, a schedule of salaries and fees to be paid hereunder. Such petition must be presented to the board twenty days prior to a general election, and the result of such election shall be determined and declared in all respects as other elections are determined and declared under this Subdivision.

1899 5th Ses. p. 423, Sec. 38.

**Section 2681. Officers Must not be Interested in Contract:** No director or any other officer named in this Subdivision shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom.

1899 5th Ses. p. 423, portion of Sec. 39. Penal Portion, Sec. 5173.

**Section 2682. Special Election for Assessment Purposes:** The board of directors may, at any time, when in their judgment it may be advisable, call a special election, and submit to the qualified electors of the district the question, whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this Subdivision. Such election must be called upon the notice prescribed, and the same shall be held, and the result thereof determined and declared in all respects in conformity with the provisions of Section 2654. The notice must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. At such elections, the ballots shall contain the words "Assessment—Yes," or "Assessment—No." If two-thirds or more of the votes cast are "Assessment—Yes," the board shall, at the time of the annual levy hereunder, levy an assessment sufficient to raise the amount voted. The assessment so levied shall be computed and entered on the assessment roll by the secretary of the board and collected at the same time and in the same manner as other assessments provided for herein; and when collected, shall be paid into the district treasury for the purposes specified in the notice of such special election.

1899 5th Ses. p. 423, Sec. 40.

**Section 2683. Must not Incur Debts Except as Provided:** The board of directors, or other officers of the district, shall



have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this Subdivision; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void except for the purpose of organization or for any of the purposes of this Subdivision, the board of directors may, before the collection of the first assessment, incur an indebtedness not exceeding in the aggregate, the sum of two thousand dollars, and may cause warrants of the district to issue therefor, bearing interest at seven per cent. per annum.

1899 5th Ses. p. 423, Sec. 41.

**Section 2684. Navigation and Mining Rights Must not be Impaired:** Navigation shall never in anywise be impaired by the operation of this Subdivision, nor shall any vested interest in or to any mining water rights or ditches or in or to any water or water rights, or reservoirs or dams now used by the owners or possessors thereof in connection with any mining industry, or by persons purchasing or renting the use thereof, or in or to any other property now used, directly or indirectly in carrying on or promoting the mining industry, ever be affected by or taken under its provisions, save and except that rights of way may be acquired over the same.

1899 5th Ses. p. 424, Sec. 42.

**Section 2685. This Subdivision does not Authorize Diversion of Water to Detriment of Prior Claimants:** None of the provisions of this Subdivision shall be construed as repealing or in anywise modifying the provisions of any other law relating to the subject of irrigation or water distribution except in relation to irrigation districts.

Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal, or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of the state authorizing the taking of private property for public uses.

1899 5th Ses. p. 424, Sec. 43.

**Section 2686. Petition to Annex New Territory to District:** The holder or holders of any title, or evidence of title, representing one-half or more of any body of lands adjacent to the boundary of any irrigation district, which are contiguous and which, taken together, constitute one tract of land, may file with the board of directors of said district, a petition in writing, praying that the boundaries of said district may be so changed as to include therein the said lands. The petition shall describe the boundaries of said parcel or tract of land, shall also describe the boundaries of the several parcels owned by the petitioners, if the petitioners be the owners, respectively, of distinct parcels, but such description need not be more particular than they are required to be when such lands are entered by the county assessor in the assessment book. Such petition must

contain the assent of the petitioners to the inclusion within said district of the parcels or tracts of land described in the petition, and of which said petition alleges they are, respectively, the owners, and it must be acknowledged in the same manner that conveyances of land are required to be acknowledged.

1899 5th Ses. p. 424, Sec. 44.

**Section 2687. Notice of Filing of Petition, What must State:** The secretary of the board of directors shall cause a notice of the filing of such petition to be given and published in the same manner and for the same time that notices of special elections, for the issue of bonds, are required by this Subdivision to be published.

The notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petition; and it shall notify all persons interested in or that may be affected by such change of boundaries of the district, to appear at the office of the said board, at a time named in said notice, and show cause in writing, if any they have, why the change in the boundaries of said district as proposed in said petition, should not be made. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for publication of the notice. The petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under this Subdivision.

1899 5th Ses. p. 424, Sec. 45.

**Section 2688. Hearing on Petition:** The board of directors, at the time and place mentioned in the notice or at such other time or times to which the hearing of the said petition may be adjourned, shall proceed to hear the petition and all the objections thereto presented in writing by any person, showing cause, as aforesaid, why said proposed change of the boundaries of the district should not be made. The failure by any person interested in said district or in the matter of the proposed change of its boundaries, to show cause in writing as aforesaid, shall be deemed and taken as an assent on his part to a change of the boundaries of the district as prayed for in said petition, or to such a change thereof as will include a part of said lands. And the filing of such a petition with said board as aforesaid, shall be deemed and taken as an assent on the part of each and all petitioners to such a change of said boundaries, that they may include the whole or any portion of the lands described in said petition.

1899 5th Ses. p. 425, Sec. 46.

**Section 2689. Condition Precedent to Granting Petition:** The board of directors to whom such petition is presented may require, as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated (the several amounts to be determined by the board), as said petitioners or the grantors would have been required to pay to such district as assessments had such lands



been included in such district, at the time the same was originally formed.

1899 5th Ses. p. 425, Sec. 47.

**Section 2690. May Reject or Grant Petition. Order Granting must Describe Boundaries:** The board of directors, if they deem it not for the best interests of the district that a change of its boundaries be so made as to include therein the lands mentioned in the petition, shall order that the petition be rejected. But if they deem it for the best interests of the district that the boundaries of said district be changed and if no person interested in said district or the proposed change of its boundaries show cause, in writing, why the proposed change should not be made, or if one having shown cause, withdraws the same, the board may order that the boundaries of the district be so changed as to include therein the lands mentioned in said petition or some part thereof. The order shall describe the boundaries as changed, and shall also describe the entire boundaries of the district as they will be after the change thereof as aforesaid is made; and for that purpose the board may cause a survey to be made of such portions of such boundary as is deemed necessary.

1899 5th Ses. p. 425, Sec. 48.

**Section 2691. Resolution where Objection is Made:** If any person interested in said district, or the proposed change of its boundaries, shall show cause as aforesaid why such boundaries should not be changed, and shall not withdraw the same, and if the board of directors deem it for the best interests of the district that the boundaries thereof be so changed as to include therein the land mentioned in the petition, or some part thereof, the board shall adopt a resolution to that effect. The resolution shall describe the exterior boundaries of the lands which the board are of the opinion should be included within the boundaries of the district when changed.

1899 5th Ses. p. 425, Sec. 49.

**Section 2692. Upon Adoption of Resolution Special Election Shall be Called:** Upon the adoption of the resolution mentioned in the last preceding Section, the board shall order that an election be held within said district to determine whether the boundaries of the district shall be changed as mentioned in said resolution, and shall fix the time at which such election shall be held, and cause notice thereof to be given and published. Such notice shall be given and published, and such election shall be held and conducted, the returns thereof shall be made and canvassed, and the result of the election ascertained and declared, and all things pertaining thereto conducted in the manner prescribed by this Subdivision in case of a special election to determine whether bonds of an irrigation district shall be issued. The ballots cast at said election shall contain the words "For change of Boundary," or "Against change of Boundary," or words equivalent thereto. The notice of election shall describe the

proposed change of the boundaries in such manner and terms that it can be readily traced.

1899 5th Ses. p. 425, Sec. 50.

**Section 2693. Proceedings After Election:** If at such election a majority of all the votes cast at said election shall be against such change of boundaries of the district, the board shall order that said petition be denied, and shall proceed no further in the matter.

But if a majority of such votes be in favor of such change of the boundaries of the district, the board shall thereupon order that the boundaries be changed in accordance with said resolution adopted by the board. The said order shall describe the entire boundaries of said district, and for that purpose the board may cause a survey of such portion thereof to be made as the board may deem necessary .

1899 5th Ses. p. 426, Sec. 51.

**Section 2694. Record of Change of Boundaries to be Filed with County Recorder:** Upon a change of the boundaries of a district being made, a copy of the order of the board of directors ordering such change, certified by the president and secretary of the board, shall be filed for record in the recorder's office of each county within which are situated any of the lands of the district, and thereupon the district shall be and remain an irrigation district, as fully, and to every intent and purpose, as if the lands which are included in the district by the change of the boundaries, as aforesaid, had been included therein at the original organization of the district.

1899 5th Ses. p. 426, Sec. 52.

**Section 2695. Record of Petition. Evidence of Petition:** Upon the filing of the copies of the order, as in the last preceding Section mentioned, the secretary shall record in the minutes of the board, the petition aforesaid and the said minutes, or a certified copy thereof, shall be admissible in evidence, with the same effect as the petition.

1899 5th Ses. p. 426, Sec. 53.

**Section 2696. Guardian, etc., may Act for Ward when:** A guardian, executor, or an administrator of an estate who is appointed as such under the laws of this State, and who, as such guardian, executor, or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may, on behalf of his ward or the estate which he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition in this Subdivision mentioned why the boundaries of the district should not be changed.

1899 5th Ses. p. 426, Sec. 54.

**Section 2697. After Change of Boundaries New Precincts Must be Established:** In case of the inclusion of any land within any district by the proceedings under this Subdivision, the board of directors must, at least thirty days prior to the next succeeding general election, make an order re-dividing such district into



five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, and one director shall thereafter be elected by each division. For purposes of elections, the board of directors must establish a convenient number of election precincts in said districts, and define the boundaries thereof, which said precincts may be changed from time to time, as the board deem necessary.

1899 5th Ses. p. 426, Sec. 55.

**Section 2698. Consolidation of Districts:** Whenever the boards of directors of any two or more irrigation districts which are contiguous, deem it for the best interest of their respective districts that the same be consolidated into a single district, such boards of directors may petition the board of county commissioners for an order for an election, to vote upon the question of such consolidation, which petition shall state in detail the terms upon which such consolidation is proposed to be made. Upon receiving such petitions said board of county commissioners shall request the state engineer to investigate the conditions of such districts and all questions affecting such proposed consolidation, and he shall make report of the result of such investigations to the board of county commissioners, not more than ninety days after such request is received. At the time said report upon the matter is made, said board of county commissioners, if deemed advisable, shall make an order fixing a time for an election in said districts to vote upon the question of such proposed consolidation, which time shall not be less than thirty nor more than sixty days after the date of said report.

Notice of such election shall be published as required for notice of election in Section 2636; and the said boards of directors shall make all necessary arrangements for such election in their respective districts as provided in this Subdivision for other elections. The ballot shall be substantially as follows:

“Consolidation—Yes;” “Consolidation—No.”

The said boards of directors shall canvass the returns of such election, as provided in case of usual district elections, and shall immediately thereafter transmit by messenger or registered mail, certified abstracts of the result of said election in their respective districts, to the clerk of the board of county commissioners.

Within ten days after such returns are received by said clerk the said board of county commissioners shall meet and canvass the same. If it appears that a majority of all the votes cast in each of said districts is “Consolidation—Yes” said board shall make an order, and enter the same of record in its minutes, establishing said consolidated district, giving its boundaries and designation, and in detail, the terms under which the consolidation has been effected, and dividing said consolidated district into five divisions, and shall appoint some person qualified under this sub-division, to act as director for each of said divisions of said district until the next general election for the election of officers under the operation of this Subdivision: *Provided, however,* That the organization of such district shall not take effect

until the first Tuesday of the February following said order of its establishment.

If the date provided by law for the election of directors shall come between the date of said order of the board of county commissioners and said first Tuesday of February, then in making such order said board shall designate the board of directors of one of the consolidated districts as a board to take charge of said election, and a director shall in that case be elected for each division of the consolidated district, and in that case no appointment of directors shall be made by the board of county commissioners.

If, however, upon such canvass by said board of county commissioners it appears that a majority of the votes cast in any district thus proposed to be consolidated is "Consolidation—No," then a record of that fact shall be entered in the minutes of said board of county commissioners, and all the proceedings had under this Section shall be void.

1899 5th Ses. p. 426, Sec. 56.

**Section 2699. Annual Financial Statement:** On or before the first Tuesday of February of each year, the board of directors of each irrigation district organized under this Subdivision, shall publish in at least one issue of some newspaper, published in the county or counties in which such district is situated, a full, true, and correct statement of the financial condition of said district on the first Monday of the preceding January, giving a statement of all liabilities and assets of the district on such first Monday of January.

1899 5th Ses. p. 427, Sec. 57.

**Section 2700. Members of Board of County Commissioners may Inspect Books:** Any board of directors of any such irrigation district or the secretary thereof, shall allow at any time any member of the board of county commissioners, when acting under the order of such board, to have access to all books, records and vouchers of the district which are in possession or control of said board of directors or said secretary of said board.

1899 5th Ses. p. 428, Sec. 58.

**Section 2701. Court or Judge may Appoint Watermaster, When:** In all cases where the waters of any stream used for irrigation, domestic or milling purposes, have, by the decree of the district court, been adjudicated and allotted, such court, or the judge thereof, shall, on or before the first day of May of each year, appoint some suitable person as watermaster of the stream or streams named and included in such decree to distribute such water to the users thereof, in accordance with the provisions of such decree.

1899 5th Ses. p. 369, Sec. 1; 1897, 4th Ses. p. 56, Sec. 1.

**Section 2702. Watermaster, Bond of, Duties. Head-gates, how Made:** Such watermaster shall as soon as necessary, enter upon the discharge of his duties by first filing with the clerk of the district court in and for the county wherein such decree was rendered, a bond with sureties thereon, to be approved by the judge of



said court, in the sum to be fixed by the judge of such court and named in said order of appointment, and by proceeding in person to notify each person receiving water in his district to provide or repair the headgates at the points where they take water from any ditch, dam, or reservoir, and to provide or repair a suitable overflow gauge in each dam; and the watermaster must see that there are provided the necessary gates, flumes, dams, and other devices for distributing water, and he has such control of the location of ditches, dams, gates, flumes and other devices for distributing water as may be necessary to prevent waste and secure the most equitable distribution of the water to all entitled to its use—subject always to review by the district court, or the judge thereof making said order or decree.

The headgates at the points where the water is taken from any ditch, dam, or reservoir, shall be double, and so constructed that one gate can be locked at any given point by the watermaster; and the watermaster shall place a substantial lock on each gate, so as equitably to regulate the flow of water, and no one but the watermaster or his deputies shall have possession of the keys that belong to said locks.

1899 5th Ses. p. 370, Sec. 2, amending p. 57, Sec. 2.  
1899 5th Ses. p. 303, Sec. 2; 1897 4th Ses.

**Section 2703. Watermaster Must Patrol Stream when:** During the irrigation season, said watermaster, shall patrol said stream on either side, and shall examine the headgates described in Section 2702, as frequently as twice each week and regulate the same as directed and required by the provisions of this subdivision.

1899 5th Ses. p. 303, Sec. 2; 1897 4th Ses. p. 57, Sec. 3.

**Section 2704. Must Distribute According to Decree of Court:** To aid him in the discharge of his duties, such watermaster shall procure a copy of the decree of the court allotting the water of such stream, and shall in the distribution of such water be governed by such decree, distributing such water to those prior in right, as such decree has awarded.

1899 5th Ses. p. 303, Sec. 4; 1897 4th Ses. p. 57, Sec. 4.

**Section 2705. May Appoint Deputies. Fees, how Fixed:** Such watermasters may appoint suitable persons as deputies who shall have the same powers and shall perform the duties of the watermaster under the same watermaster's direction and such watermaster and his deputies shall receive for their services such compensation as the district court, or judge thereof shall fix; which amount of compensation shall be so fixed by said court, or the judge thereof, at the time of making such aforesaid appointment.

1899 5th Ses. p. 370, Sec. 3, amending p. 57, Sec. 5.  
1899 5th Ses. p. 303, Sec. 5; 1897 4th Ses.

**Section 2706. Sworn Statement by Watermaster, What to Contain, Where Filed:** Said watermaster shall make up a sworn statement and file the same with the auditor and recorder of the county or counties through, or into which, said streams shall run or enter. Such statement shall show the number

of days said watermaster has devoted to the distribution of such water, and the number of days his deputy or deputies has or have devoted to the same purpose, and he shall also at the same time file a statement with said officer showing the amount of water he has by virtue of such decree of the court distributed to each individual, and describe the lands upon which said water was used.

1899 5th Ses. p. 303, Sec. 6, 1897 4th Ses. p. 57, Sec. 6.

**Section 2707. Auditor to Distribute Expense, how:**

The county auditor and recorder shall thereupon apportion the whole of the expenses of watermaster and deputies to the several users of water as shown by such statement, in proportion to the amount of water distributed to each individual user of such water, and shall notify each person to whom he has by the terms of this Subdivision apportioned, such expenses of the amount of his liability on said charge of the watermaster as shown by the number of days claimed by the watermaster and deputies, and the per diem agreed upon or fixed by the judge as the case may be.

1899 5th Ses. p. 304, Sec. 7; 1897 4th Ses. p. 58, Sec. 7.

**Section 2708. Collection of Expense. Delinquents:**

The county auditor and recorder shall collect said sums from each person, as shown by such apportionment, and unless the same is paid on or before the first day of January next succeeding such irrigation season, or as much as shall not be so paid, shall thereafter become a lien on the lands owned by such delinquents, and shall be added to the amount against said lands, by the assessor, the succeeding year, under the head of "delinquent water tax."

1899 5th Ses. p. 304, Sec. 8; 1897 4th Ses. p. 58, Sec. 8.

**Section 2709. Watermaster, how Paid:** So much of said sums as the auditor and recorder shall collect, shall be paid over to the watermaster, and be receipted for by him. And the amount yet unpaid on the date of the regular meeting of the board of county commissioners, in January, shall become a charge against the county, and shall be paid for by the board of county commissioners, by issuing to said watermaster a warrant on the current expense fund of the county.

1899 5th Ses. p. 304, Sec. 9; 1897 4th Ses. p. 58, Sec. 9.

**Section 2710. "Watermaster Tax," how Collected:**

It shall be the duty of the county recorder to certify all delinquents to the assessor on or before the first day of March, and the assessor shall add to the delinquent amount, as "Watermaster Tax," and collect the same as other taxes, and the same shall constitute a lien upon the real estate, to which said water attaches and belongs by virtue of such decree of the court referred to in this Subdivision.

1899 5th Ses. p. 304, Sec. 10; 1897 4th Ses. p. 58, Sec. 10.

**Section 2711. Neglect to Provide Headgates, etc., Duty of Watermaster:** Should any of the water users or claimants fail or refuse to provide or repair suitable headgates and overflow gauges, or other devices used to prevent waste, and secure the equit-



able distribution of water allotted to such persons as provided for in this Subdivision, the watermaster shall cause the same to be repaired or constructed, and shall charge the net expenses of the same to such water claimant, and such charge shall be included in the sworn statement of the watermaster, provided for in Section 2706, and such amount shall be added to the liabilities of such water claimant as part of his share of expenses of distribution of water for the season, and shall be collected as provided in said Section 2706 for the collection of other water expenses.

1899 5th Ses. p. 370, Sec. 4, amending      Ses. p. 59, Sec. 11.

1899 5th Ses. p. 304, Sec. 11; 1897 4th

**Section 2712. User Must not Waste Water. Duty of Watermaster to Prevent Waste:** No person or persons who has or have, by the provisions of any decree heretofore or hereafter made by the court, the right to the use of a certain amount of the water of such streams shall waste any of said water willfully or by negligence either by the continuance of the flow or water through his or their ditches in excess of the amount necessarily used, or by lack of proper embankments, dikes, or flumes; and shall keep his or their ditches in good repair so as to prevent the waste of any water, and it shall be the duty of the watermaster to prevent such waste, and upon notice by the watermaster, served in writing upon any claimant or user of such water, that the water diverted from said stream, or the water of any ditch diverting water from said stream, is going to waste, fully describing the cause and place of such waste, such claimant shall be required to so repair said ditch as to prevent such waste; and in case such claimant or user of the water suffers such waste to continue for three days after the service of such written notice by the watermaster, such watermaster shall proceed to repair such ditches so as to prevent such waste, and shall charge the net expenses of the same to such water claimant, and such charges shall be included in the sworn statement of the watermaster provided for in Section 2706, and such amount shall be added to the liabilities of such water claimant, as a part of his share of the expenses of the distribution of water for the season, and shall be collected as provided in Section 2706 for the collection of other water expenses.

1899 5th Ses. p. 370, Sec. 5.

For provisions relating to supple-      mentary decree in water cases, see Code Civil Proc., Sec. 3951-3954.

CHAPTER CVII.

DISPOSAL OF TOWN SITES ENTERED UNDER THE LAWS OF THE UNITED STATES.

Section.	Section.
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2714. Officer must make conveyance to party entitled.	2718. What evidence may be given at trial.
2715. Officer must publish notice of entry.	2719. Officer must bring action when. Complaint and answer.
2716. Statement of party claiming interest, when made, what to contain.	2720. Officer to render account. Compensation, how paid.
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## Section.

2722. Conveyance to claimants must be made, when.  
 2723. When officer acquires absolute title.  
 2724. Officer holds title in trust for adverse claimants.

## Section.

2725. Costs of action, how recoverable.  
 2726. Contracts for conveyance may be enforced.  
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**Section 2713. Duty of Certain Officers to Make Entry of Town Site:** It is the duty of the corporate authorities of any city or incorporated town; or of the probate judge of any county in which is situate any incorporated town, to enter at the proper land office of the United States such quantity of land as the inhabitants of such city or town may be entitled to claim, in the aggregate, according to the population, in the manner required by the laws of the United States and the regulations prescribed by the Secretary of the Interior of the United States, and make and sign all necessary declaratory statements, certificates and affidavits, or other instruments requisite to carry into effect this Chapter and Chapter eight of Title thirty-two of the Revised Statutes of the United States, and to make proof, when required, of the facts necessary to establish the claim of such inhabitants to the lands so granted by the laws of Congress.

1887 R. S. Sec. 2200; 1875 Compiled Laws, p. 698, Sec. 1.

**EFFECT OF TOWNSITE ACT OF CONGRESS:** The effect of the act of Congress in relation to townsites, which had been established, and those thereafter to be established on the public lands, was to secure to such towns and cities the privileges which the former had usurped and the latter would need; it had the effect of dedicating to the public use so much of the public land as had been appropriated to streets, squares, and alleys and to confer a license for a like appropriation in the future.—*Jones v. City of Petaluma*, 36 Cal. 230. The effect of said act was also to protect the equitable rights of those in a bona fide occupation of lands in towns that were already established, and to enable persons to acquire small parcels at a nominal price in towns thereafter to be located.—*Aleman v. Petaluma*, 38 Cal. 553; *Ricks v. Reed*, 19 Cal. 551. To entitle a party to protection as a bona fide purchaser, he must aver and prove the possession of his grantor, the purchase of the premises and payment of the purchase money in good faith, without notice.—*Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641; *Lechler v. Chapin*, 12 Nev. 71; *Wilhoit v. Lyons*, 98 Cal. 409, 33 Pac. 325.

## CORPORATE AUTHORITIES ARE

**TRUSTEES:** Under the act of Congress regarding the disposal of town sites, the corporate authorities of municipalities are mere trustees of occupants of the land within the limits of the municipality and must execute their trusts under such regulations as are prescribed by the legislature. The mere adoption by the town authorities of an official map of the town which shows a street laid out through lands in the actual occupation of a private person at the date of the act, does not affect the right of the occupant of the lands so designated as a street.—*Cerf v. Pfleging*, 94 Cal. 131, 29 Pac. 417; *McCreery v. Duane*, 52 Cal. 293; *Dupond v. Barstow*, 45 Cal. 446; *Baker v. Brickell*, 87 Cal. 329, 25 Pac. 489; *McCreery v. Sawyer*, 52 Cal. 257; *Palmer v. Galvin*, 72 Cal. 183, 13 Pac. 476.

**RIGHTS OF OCCUPANTS:** The rights of one who is a bon fide occupant of lands patented by the proper corporate authorities of a town or city under the townsite act of Congress, descends to his heirs.—*Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641. The occupant of lands for whose benefit the townsite act was passed is an equitable interest in the lands, and if such occupant is an unmarried woman and marries, such interest is her separate property.—*Morgan v. Lones*, 80 Cal. 317, 22 Pac. 253.

**Section 2714. Officer must Make Conveyance to Party Entitled:** Any such corporate authorities, or judge, holding the title to any such lands in trust, as declared in said acts of Congress, must by a good and sufficient conveyance, grant and convey



the title to each and every block, lot, share or parcel of the same to the person entitled thereto, according to his rights or interest in the same as they exist, in law or equity, at the time of the entry of such lands, and when any parcel or share of such lands is occupied or possessed by any one or more persons, claiming the same by grant, lease or sale, the respective rights and interests of such persons, in relation to each other in the same, are not changed or impaired by any such conveyance. Every conveyance, by such corporate authorities or judge, pursuant to the provisions of this Chapter, must be so executed and acknowledged as to admit the same to be recorded, and if made previous to the issuing of the patent for such lands, it must contain a covenant that the grantor will, after the issuing of such patent, execute, acknowledge and deliver to the grantee, his heirs or assigns, such further conveyance, as may be or become necessary to fully vest and perfect the title to the lands therein described in the grantee, his heirs or assigns.

1887 R. S. Sec. 2201; 1875 Comp. Laws, p. 699, Sec. 2.

### **Section 2715. Officer must Publish Notice of Entry:**

Within thirty days after the entry of such lands the corporate authorities or judge, entering the same, must give public notice of such entry by posting the notice thereof in at least three public places in said town, and by publishing such notice in a newspaper printed and published in the county in which such town is situated, or, in case there is no such newspaper, then in some newspaper printed and published at the seat of government; such notice must be so published once in each week for at least three successive weeks, and must contain the name of the town site, and an accurate description of the lands so entered as the same are described in the certificate of entry or duplicate receipt for the purchase money thereof, issued at the time of entry.

1887 R. S. Sec. 2202; 1875 Comp. Laws, p. 699, Sec. 3.

### **Section 2716. Statement of Party Claiming Interest, When made, What to Contain:**

Every person, association, or company claiming to be entitled to such lands, or any block, lot, share or parcel thereof, must within sixty days after the first publication of such notice, in person or by duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts in which he claims to have an interest, and the specified right, interest, or estate therein, which he claims to be entitled to receive, also a brief statement of the facts upon which such right, interest, or estate depends for its validity, and deliver the same to such corporate authorities or judge, and all persons failing to sign and deliver such statement, within the time specified in this Section, are, as against any claimant, forever barred the right of claiming or recovering such lands, or any interest therein.

1887 R. S. Sec. 2203; 1875 Comp. Laws, p. 699, Sec. 4.

**MAYOR'S DEED** An applicant for a mayor's deed for lots in a townsite, entered under the act of Congress, must set forth in his application

all the facts necessary to entitle him to such deed, as required by the territorial law.—*Greathouse v. Head*, 1 Idaho, 482. A townsite occupant must comply with the law in regard to improvements, occupancy, etc., and make

application for deed in accordance with the law, and pay the price for such land, before he is entitled to a deed; and until he performs those acts and pays

such price he may lose the land claimed by abandonment.—*Young v. Tiner* (Idaho), 38 Pac. 697.

### **Section 2717. Adverse Claims; how Determined:**

In case there are adverse claimants to such lands, or to any part, parcel or share thereof, and the controversy is not settled by agreement in writing between the parties thereto, such controversy may be determined by voluntary submission thereof by the parties to reference or arbitration and by the written award of the arbitrators; and in case any such controversy is not so settled or determined within three months from the time of the entry of the land, either of the claimants may bring a civil action against the adverse claimant in the district court for the county in which the lands are situated.

1887 R. S. Sec. 2244; 1875 Comp. Laws, p. 700, Sec. 5.

**EQUITY** An action under the townsite act to settle the rights of parties to enter lots in such townsite assimilates more to a suit in equity to quiet title than to any other form of

action.—*Forsythe v. Richardson*, 1 Idaho, 459.

**PARTIES:** In an action to settle rights under the townsite act, the mayor of the city is not a necessary party.—*Forsythe v. Richardson*, supra.

### **Section 2718. What Evidence May be Given at Trial:**

Upon the trial in such action either party may give in evidence the statement mentioned in this Chapter, deposited by the other, or by the person under whom he claims, with the corporate authorities or judge holding the title to the lands in controversy therein, and the person who made the first claim to, and settlement upon such lands, either in person or by agent, servant or tenant, or those claiming under him, must in such actions be deemed to have the right to such lands, provided there has been no abandonment thereof since such settlement.

1887 R. S. Sec. 2205; 1875 Comp. Laws, p. 700, Sec. 6.

**OCCUPANCY:** An occupancy of one legal subdivision does not draw to it another legal subdivision, though contiguous to or immediately adjoining it, —*Thompson v. Holbrook*, 1 Idaho, 609; *Young v. Tiner* (Idaho), 38 Pac. 697.

**IMPROVEMENTS, ABANDONMENT:** If a person has at one time been an occupant of a lot within the meaning of the law by erecting an en-

closure around it, but, before his application for a deed, has suffered such enclosure to be destroyed by freshets, or taken away by tenants, so as to leave the lot open to the public, he shall be deemed to have abandoned it, and another person may enter thereon and become an occupant, so as to entitle him to a deed from the mayor.—*Thompson v. Holbrook*, 1 Idaho, 609; *Young v. Tiner* (Idaho), 38, Pac. 697.

### **Section 2719. Officer must Bring Action when Complaint and Answer:**

In case any controversy between adverse claimants to such lands is not settled or determined by agreement or arbitration within the time allowed therefor as hereinbefore specified, and no action to determine the same is commenced by either claimant within one month thereafter, the corporate authorities or judge holding the title to any such lands, must bring an action in the district court for the county in which the lands in controversy are situated, against the adverse claimants thereto, to settle and determine such controversy. The complaint in such case must be in the nature of a bill of interpleader, and set forth a description of the lands thus



claimed by adverse claimants, and the character and extent of the right, interest or estate therein claimed by each, as the same appears by the statements deposited with such authorities or judge (as the case may be), and pray that the several adverse claimants may be required to appear in such court and prosecute their claims or be forever barred. Any party to such action who fails to appear and answer such complaint, and thus prosecute his claim to the land described therein, pursuant to the summons in such case, and the practice of the district court, is forever barred of the right to assert any claim or title to such lands adverse to the other claimants in any court whatsoever. If the adverse claimants of the land described in the complaint appear, they must respectively answer such complaint and either disclaim any right, title, interest or estate in the land therein described, or set forth the nature, character and extent of the title and interest which they respectively claim therein.

1887 R. S. Sec. 2206; 1875 Comp Laws, p. 700, Sec. 7.

**Section 2720. Officer to Render Account. Compensation, how Paid:** As soon as may be after the expiration of sixty days from the first publication of the notice, the corporate authorities or judge holding the title to the lands described in such notice, must make a true statement in writing containing a true account of moneys expended in the acquisition of the title, and the administration or execution of the trust to that time, including all moneys paid for the purchase of such lands, all necessary traveling expenses, all moneys paid for posting and publishing such notices, and for proof thereof, and for all other necessary and proper expenses incident to such trust, and also a true account for time and service employed in the business of such trust to that time. The whole amount of such account for moneys and reasonable charges for compensation is a charge upon the lands so held in trust, in favor of the trustee, and must be paid by the several claimants entitled to such lands, in proportion to the several quantities or shares thereof to which they are respectively entitled.

1887 R. S. Sec. 2207; 1875 Comp Laws, p. 701, Sec. 8.

**Section 2721. Fees must be Tendered Before Conveyance:** Before the corporate authorities or judge holding any such lands in trust as aforesaid can be required to execute, acknowledge or deliver any conveyance thereof, or of any lot, block, parcel or share thereof, as hereinbefore mentioned, to any person claiming to be entitled to such conveyance, such person must pay or tender the sum of money chargeable upon the part thereof to be conveyed according to the statement or account mentioned in the last section, together with interest on each of the money items of such account at the rate of twenty-four per cent. per annum from the time when the same accrued, and also such further sums as are a reasonable compensation for preparing, executing and acknowledging such conveyance, and the fees of the officers taking the acknowledgment thereof.

1887 R. S. Sec. 2208; 1875 Comp. Laws, p. 701, Sec. 9.

**Section 2722. Conveyance to Claimants must be Made when:** After the expiration of sixty days from the time of the first publication of the notice, the corporate authorities or judge holding the title to the lands described therein, must, upon a reasonable demand or request, and upon the payment or tender of the moneys mentioned in the last preceding section, execute, acknowledge and deliver to each and every claimant, association or company of claimants of such lands, or of any lot, block, parcel or share thereof, a conveyance thereof, according to the statement made and deposited as aforesaid; *Provided*, That no such conveyance must be executed, acknowledged or delivered for any part, lot, block or share of such lands to which there are adverse claimants until the controversy thereon is settled or determined in the manner hereinbefore prescribed, and whenever any such controversy is so settled or determined, the said corporate authorities or judge, must, upon the like demand or request, and the like payment or tender, convey the land, or interest, or share therein, the right to which has been thus ascertained to the person thereby determined to be entitled to the same.

1887 R. S. Sec. 2209; 1875 Compiled Laws, p. 702, Sec. 10.

**Section 2723. When Officer Acquires Absolute Title:** In case any judge or other officer who enters any such lands under the provisions of the acts of Congress and thus becomes the sole trustee thereof, is possessed of, or entitled to any part, lot, block or share thereof, according to and by virtue of the provisions of this Chapter, and the same is not claimed adversely to him by any person, he is seized and possessed of the title thereto and estate therein, to his own use in fee simple, absolute, free, and discharged of such trust, and no conveyance other than the patent of the lands including the same, is necessary to perfect his absolute title thereto. In case any such land or share therein so claimed by said judge or other officer, is claimed by any other person adversely to him, the conflicting claims must be adjusted or determined by settlement, arbitration or action as hereinbefore prescribed.

1887 R. S. Sec. 2210; 1875 Compiled Laws, p. 702, Sec. 11.

**Section 2724. Officer Holds Title in Trust for Adverse Claimants:** For the purpose of determining the rights of adverse claimants to any land so entered, the corporate authorities or judge hereinbefore mentioned is deemed to possess and hold the title to such lands in trust from the time of the entry thereof.

1887 R. S. Sec. 2211; 1875 Comp. Laws, p. 703, Sec. 12.

**Section 2725. Costs of Action, how Recoverable:** The costs in the actions mentioned in this Chapter are recoverable as in other civil actions.

1887 R. S. Sec. 2212; 1875 Comp. Laws, p. 703, Sec. 13.

**Section 2726. Contracts for Conveyance may be Enforced:** Every person in whom the title to any lands is vested under and by the provisions of this Chapter may be compelled to specifically perform any prior valid agreement for a conveyance.

1887 R. S. Sec. 2213; 1875 Comp. Laws, p. 703, Sec. 14.



**Section 2727. Successor in Office Succeeds to Trust. Proceedings in Case of Lost Instrument:** The successor in office of any judge, mayor or other officer who entered lands under said laws of the United States, or who was trustee for the execution of the trust in that behalf, whether such officer or trustee acted under this Chapter, or under any other general law, or any local or special act, relating to any city or incorporated town, shall succeed to the trust and shall have authority to execute the same as fully as his predecessor, the original trustee, might have done while in office; and when any mayor's or other trustees's deed of any block, lot, share or parcel of any such townsite has been lost or cannot be found and there is no record thereof in the office of the county recorder, such successor, upon application to him in writing, duly verified, showing that no mayor's or other trustee's deed can be found to the part or parcel of such townsite described in the application, and that no such deed thereto is of record in the office of the recorder of the county, and that the applicant, his ancestor, predecessor or grantor has been in the quiet, peaceable and undisturbed possession of said premises under claim of title for the full period of five years next before the application, must by good and sufficient conveyance, grant and convey the title of the premises described in the application to the applicant, which conveyance must be executed and acknowledged, and shall take and have effect as provided by Section 2714, for which, and the acknowledgment thereof, the trustee shall be entitled to receive a fee of five dollars from the applicant: *Provided*, That in every such application for deed under the provisions of this section an adverse claim to such parcel of said townsite shall be made to such mayor for the same, the mayor in every such case shall remit the parties claiming deeds to the same to a court of competent jurisdiction to settle the same, and when so determined, then the said mayor shall execute such deed to the prevailing party.

1899 5th Ses. p. 141, amending 1887 R. Sec. 15.  
S. Sec. 2214; 1875 Comp. Laws, p. 703,

## TITLE XIII.

### CONTRACTS AND OBLIGATIONS.

Chap. CVIII. Definitions and General Provisions.

Chap. CIX. Essentials of Contracts.

Chap. CX. Manner of Creating Contracts.

Chap. CXI. Sale.

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## CHAPTER CVIII.

## DEFINITIONS AND GENERAL PROVISIONS.

## Section.

2728. Third person may enforce contract, when.

2729. Seal, how affixed.

2730. Sealed and unsealed instruments, distinctions abolished.

2731. Written parts of contract control printed parts.

## Section.

2732. Stipulation upon right to enforce contract, void.

2733. Debtor may demand receipt.

2734. Objections to mode of offer waived, when.

**Section 2728. Third Person may Enforce Contract when:** A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

1887 R. S. Sec. 3221.

**Section 2729. Seal, how Affixed:** A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

1887 R. S. Sec. 3226.

**Section 2730. Sealed and Unsealed Instruments, Distinction Abolished:** All distinctions between sealed and unsealed instruments are abolished.

1887 R. S. Sec. 3227.

**Section 2731. Written Parts of Contract Control Printed Parts:** Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form, and if the two are absolutely repugnant, the latter must be so far disregarded.

1887 R. S. Sec. 3228.

**Section 2732. Stipulation upon Right to Enforce Contract, Void:** Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

1887 R. S. Sec. 3229.

**Section 2733. Debtor May Demand Receipt:** A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

1887 R. S. Sec. 3230.

**Section 2734. Objections to Mode of Offer Waived when:** All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the per-



son making the offer, and which could be then obviated by him, are waived by the creditor if not then stated.

1887 R. S. Sec. 3231.

## CHAPTER CIX.

### ESSENTIALS OF CONTRACTS.

Section.

#### PARTIES.

2735. Who may contract.

2736. Written instrument evidence of consideration.

Section.

2737. Burden of showing want of consideration, on whom.

**Section 2735. Who May Contract:** All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

1887 R. S. Sec. 3220.

This section does not confer upon a married woman the right to make any

and all contracts that may be made by a feme sole.—*Dernham v. Rowley* (Idaho), 44 Pac. 643.

**Section 2736. Written Instrument Evidence of Consideration:** A written instrument is presumptive evidence of a consideration.

1887 R. S. Sec. 3222.

In drawing instruments of any kind where consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the in-

section of every several promise or covenant. Where a sufficient consideration is expressed, none can be implied.—*Brickell v. Batchelder*, 62 Cal. 623.

**Section 2737. Burden of Showing Want of Consideration, on Whom:** The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

1887 R. S. Sec. 3223.

## CHAPTER CX.

### MANNER OF CREATING CONTRACTS.

Section.

2738. What contracts may be oral.

2739. Certain agreements to be in writing.

Section.

2740. Contract required to be in writing, may be enforced when.

**Section 2738. What Contracts May be Oral:** All contracts may be oral, except such as are specially required by statute to be in writing.

1887 R. S. Sec. 3224.

Contracts, when to be in writing: Sec. 2739, 2400, 2401.

An instrument under seal, not required by law to be sealed to give it

effect, is no more solemn, or no more binding upon the party sought to be charged thereby, than if not under seal.—*Cox v. Northwestern Stage Company*, 1 Idaho, 376.

**Section 2739. Certain Agreements to be in Writing:** In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agree-

ment cannot be received without the writing or secondary evidence of its contents.

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in Section 4445 Code of Civil Proc.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

1887 R. S. Sec. 6009.

#### PURCHASER OF REAL ESTATE, REPRESENTATIONS BY VENDOR:

A purchaser of real estate is bound to exercise ordinary prudence and discretion, and if the means of knowledge are within his power, and he neglects to make the proper inquiry, he loses his remedy against the vendor for any representations the latter makes.—*Brown v. Bledsoe*, 1 Idaho, 746.

#### FALSE REPRESENTATIONS:

False representations as to the condition, situation and value of real estate knowingly made by the vendor to the purchaser are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth, and in such cases the means by which he has been thus induced to forbear must be specifically set forth in the complaint.—*Brown v. Bledsoe*, 1 Idaho, 746.

OPERATION OF STATUTE The Statute of frauds is not intended to facilitate fraud but to prevent its perpetration.—*Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535. Courts will not allow the medium of fraud to be interposed to prevent an agreement from being put into writing; so where the statute plainly declares an agreement void, if not reduced to writing, the defendant will not be permitted to avail himself of the statute if his fraud contributed to prevent the agreement from being

put into writing.—*Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696. The statute of frauds should be liberally construed.—*Carville v. Crane*, 5 Hill, 483, 40 Am. Dec. 365. And a contract should be sustained rather than declared void under the statute of frauds where doubt exists.—*Phipps v. McFarlane*, 3 Minn. 109, 74 Am. Dec. 743. Where none of the things is done at the time the bargain is made, required to be done and performed under the provisions of this section, to take a contract of sale out of its provisions, the contract cannot be enforced against a purchaser unless he thereafter receives and accepts the property purchased. A receipt and acceptance takes the contract out of the provisions of said section.—*Coffin v. Bradbury* (Idaho), 35 Pac. 715. Said section is applicable to executory contracts and not to executed ones.—*Coffin v. Bradbury*, *supra*.

The party to be charged may waive the necessity of the writing required by the statute of frauds and thereby make the contract binding.—*St. Louis K. & N. W. R. Co. v. Clark*, 121 Mo. 161-195, 26 L. R. A. 751, 25 S. W. 192, 906.

PRESUMPTION: Unless an agreement appears from the complaint to have been verbal, the courts will presume that it was in writing, where the nature of the agreement is such that it could not be valid unless in writing.—*Bowman v. Ainslee*, 1 Idaho, 644.



**NOTICE OR MEMORANDUM:** Several different writings may be read together as constituent parts of the memorandum within the statute of frauds, where, when they are viewed together in the light of the situation and circumstances of the past at the time they were written, they show unmistakably that they relate to the same matter and constitute several parts of one connected transaction, although there is no express reference from one to the other.—*White v. Breen*, 106 Ala. 159, 32 L. R. A. 127, 19 So. 59. The omission of one or more of the essential elements of a memorandum of the sale of real property under the statute of frauds from a writing containing some of the elements signed by the appointee in a power of attorney to sell that particular land, may be supplied by reference to the power of attorney which contains such elements.—*White v. Breen*, *supra*. The statute of frauds only requires that a memorandum in writing for the sale of land shall be signed by the vendor or his agent. It need not be signed by the vendee and need not be a specialty; and the power of the agent to make it may be given verbally.—*Rutenberg v. Main*, 47 Cal. 213. A deed placed in escrow but not delivered, could not be regarded as a sufficient memorandum of the parol agreement for the sale of the land to satisfy the statute of frauds, where it does not recite the terms of the contract.—*Kopp v. Reiter*, 146 Ill. 437, 22 L. R. A. 273, 34 N. E. 942. See *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. The fact that an express contract contemplates another more formal contract with a corporation in which the contractee is largely interested does not affect its binding power.—*Drummond v. Crane*, 159 Mass. 577, 23 L. R. A. 707, 35 N. E. 90. Letters and telegrams which constitute an offer and acceptance of a proposition, complete in its terms, may constitute a binding contract, although there is no understanding that the agreement shall be expressed in a formal writing, and one of the parties afterwards refuses to sign such an agreement without material modifications.—*Sanders v. Pottlitzer Bros. Fruit Co.* 144 N. Y. 209, 29 L. R. A. 431, 39 N. E. 75.

**"NOT TO BE PERFORMED WITHIN A YEAR:"** An oral agreement which may or may not be fully performed within one year, is not within that clause of the statute of frauds which requires "any agreement not to be performed within one year from the making thereof" to be in writing in order to support an action thereon,—

*Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80; *Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 69. And this is true, although it is not actually performed until after that time.—*Peters v. West*, 19 Pick. 364, 31 Am. Dec. 142. Neither is it within the statute of frauds if, by its terms or by reasonable construction, it can be fully performed within a year, although it can only be done by the occurrence of some contingency, as death, by no means likely to happen.—*Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720. Nor if the agreement on one side can be performed within a year, and is so performed, although the agreement on the other side is impossible to be preformed within that time.—*Blanding v. Sargent*, *supra*; *Carnig v. Carr*, 167 Mass. 544, 35 L. R. A. 512, 46 N. E. 117.

**PAYMENT OF DEBT OF ANOTHER:** Where the defendant introduced a party asking credit, and instructed that the account be charged to him, and afterwards pays part, it is an original promise and he is liable for the balance due.—*Sears v. Flodstrom* (Idaho), 49 Pac. 11. Where G. owes C. and M. owes G., C. demands pay of G., G. gives him an order on M., M. accepts the order, pays part and promises to pay the balance in future, M. is released as G.'s debtor and becomes the debtor of C. and M. thereby accepts C. as his creditor in place of G. M. is paying his own debt to a different person than the one he originally agreed to pay it to. He is paying his own debt, not the debt of another.—*Casey v. Miller* (Idaho), 32 Pac. 195. When C. receives property belonging to S. and agrees to pay A. a debt owing from S. to A., provided C. realizes such sum out of such property, it is an original promise and not within the statute of frauds.—*Smith v. Caldwell* (Idaho), 55 Pac. 1065. See also *Elbring v. Mullen* (Idaho), 38 Pac. 404.

**MARRIAGE:** Marriage constitutes such part performance by a woman of a contract in consideration of marriage, as to prevent the operation of the statute of frauds in respect to the contract.—*Nowack v. Berger*, 133 Mo. 24, 31 L. R. A. 810, 34 S. W. 489.

**CONTRACTS AS TO REALTY:** An instrument creating an easement is within the operation of the statute of frauds.—*Nunnally v. Southern Iron Co.* 94 Tenn. 397, 28 L. R. A. 421, 29 S. W. 369. An agreement to re-convey land which had been conveyed, as a mortgage upon payment of the mortgaged debt, is not a contract for the sale of an interest in the land within the statute of frauds.—*Mussey v. Yates*, 65 Vt. 499, 21 L. R. A. 516, 27 At. 167.

**Section 2740. Contract Required to be in Writing, May be Enforced when:** Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice may enforce it against the fraudulent party.

1887 R. S. Sec. 3225.

## CHAPTER CXI.

### SALE.

#### Section.

2741. When seller must act as depositary.

2742. Delivery, where made.

2743. Expenses of transportation.

2744. Notice of election as to delivery.

#### Section.

2745. Warranty of title to personal property.

2746. Warranty on sale by sample.

2747. Marks of quality and quantity.

2748. Warranty of provisions for domestic use.

### SALE.

#### **Section 2741. When Seller Must Act as Depositary:**

After personal property has been sold and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property without charge, until the buyer has had a reasonable opportunity to remove it.

1887 R. S. Sec. 3252.

Depositary Sec. 2223.

**Section 2742. Delivery, Where Made:** Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced.

1887 R. S. Sec. 3250.

**WHAT IS A SUFFICIENT DELIVERY:** In determining whether delivery has been made, regard must be had to all the facts bearing upon the particular question, and especially to the character of the transaction in which the parties may have been engaged, to ascertain whether the delivery was such as the nature of the case admitted.—Hall & Loney v. Richardson, 16 M. 397, 77 Am. Dec. 303, in which it was held that flour purchased for shipment, is delivered to purchaser by being marked with the initials of the purchaser and of the ship and being delivered to the proper agent of the ship. Delivery of personal property in order to pass title, requires an acceptance and an actual, notorious and unequivocal claim of possession.—Herr v. Denver Mill. & M. Co. 13 Colo. 406, 3 L. R. A. 641, 22 Pac. 770. Delivery is a fact dependent on the intention, and must be determined by the jury from a consideration of the whole evidence.—Byer v. Etnyre, 2 Gill, 150; 41 Am. Dec. 410. Delivery is incomplete while any thing remains to be done. In delivery

of goods already in buyer's possession, the same acts of segregation, offer, and acceptance are necessary as in other cases.—Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241; Hunt v. Thurman, 15 Vt. 336, 40 Am. Dec. 683. Where a contract between vendor and vendee is silent upon the subject of the place of delivery, then the delivery of the property by the vendor and to a carrier for transportation, consigned to the vendee, divests the vendor's title to the property, and the vendee's title, from the moment of such delivery to the carrier, attaches.—Neimeyer Lumber Co. v. Burlington & M. R. R. Co. (Neb.), 40 L. R. A. 534, 74 N. W. 670. The sale of personal property is complete and no subsequent form of delivery thereof is necessary, where from the date of the bill of sale, the property continued to be on land or in buildings in the exclusive possession and control of the vendee.—Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713. Where the article is uniform in bulk, and the act of separation throws no additional burden on the buyer, a tender of too much from which the buyer



is to take the proper quantity, is a good delivery, at least, where the article is ordered from the correspondent, who

is agent for buying it.—*Brownfield v. Johnson*, 128, Pa. 254, 6 L. R. A. 48, 18 Atl. 543.

**Section 2743. Expenses of Transportation:** One who sells personal property must bring it to his own door or other convenient place, for its acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

1887 R. S. Sec. 3251.

**Section 2744. Notice of Election as to Delivery:** When either party to a contract of sale has an option as to the time, place, or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

1887 R. S. Sec. 3249.

**Section 2745. Warranty of Title to Personal Property:** One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto.

1887 R. S. Sec. 3245.

**ADMISSIONS OF ASSIGNOR:**  
**PURCHASER IN GOOD FAITH:** The admissions or statements of the assignor of chattels in derogation of his title thereto, made prior to his transfer of the same, cannot be introduced in evidence against the title of his assignee who purchased the same in good faith, without knowledge of such statements or admissions.—*Deasey v. Thurman*, 1 Idaho 775.

**WARRANTY OF TITLE:** The American authorities are almost universally to the effect that the vendor

of chattels in his possession warrants the title to the same by implication.—*Miller v. Van Tassel*, 24 Cal. 459. *Parsons on Contracts* (7th Ed.), vol. 1, p. 615 and note. The Code Commissioners of California in a note to Sec. 1765 of the Civil Code which is identical with the above section say: "This section is a departure from the American rule, but is in accord with recent English decisions. Under this section a warranty of title is implied from the sale whether the goods are in possession of the vendor or of third parties at the time of the sale." No cases are cited.

**Section 2746. Warranty on Sale of Sample:** One who sells or agrees to sell goods by sample, thereby warrants the quality of the bulk to be equal to the sample.

1887 R. S. Sec. 3246.

A warranty implying sale by sample is in judgment of law a warranty that the bulk of the commodity corresponds in quality with the sample.—*Beebee v. Robert*, 12 Wend. 413, 27 Am. Dec. 132; *Boorman v. Jenkins*, 12 Wend. 566, 27 Am. Dec. 158; *Dickinson v. Gay*, 7 Allen 29, 83 Am. Dec. 656; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652. Where the goods are inferior in quality to the sample, the purchaser may accept

them and bring an action for the breach of warranty.—*Hughes v. Bray*, 60 Cal. 284. The warranty implied from sale by sample is an exception to the common law rule of caveat emptor, and stands on no principle, though well established (per *Bronson, C. J.*).—*Moses v. Mead*, 1 Denio 378, 43 Am. Dec. 676. See contrary to this general rule.—*Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176; *Frayley v. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486.

**Section 2747. Marks of Quality and Quantity:** One who sells any article to which there is affixed or attached statement or mark to express the quantity or quality thereof, thereby warrants the truth thereof.

1887 R. S. Sec. 3247.

**Section 2748. Warranty of Provisions for Domestic Use:** One who makes a business of selling provisions for domes-

tic use, warrants by a sale thereof, to one who buys for actual consumption, that they are sound and wholesome.

1887 R. S. Sec. 3248.

In the sale of provisions for domestic use there is an implied warranty that they are sound and wholesome.—*Van Bracklin v. Fonda*, 12 John. 468, 7 Am. Dec. 339. See note to *Emerson v. Bringham* (Mass.), 6 Am. Dec. 117. No

warranty of soundness is implied on sale of provisions bought to be sold again, though it is otherwise if sold for immediate consumption.—*Moses v. Mead*, 1 Denio 378, 43 Am. Dec. 676 and note.

## CHAPTER CXII.

### PARTNERSHIP.

#### Section.

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#### SPECIAL PARTNERSHIP.

#### **Section 2749. Formation of Special Partnership:**

A special partnership may be formed by two or more persons in the manner and with the effect prescribed in this Subdivision, for the transaction of any business except banking or insurance.

1887 R. S. Sec. 3270; 1885, 13th Ses. p. 148.

A limited (or special) partnership is a partnership in which the liability of

some of its members to bear losses is restricted to a defined amount.—*Am. & Eng. Enc. of Law*, Vol. 13, p. 803 and note.

**Section 2750. Of Whom May Consist:** A special partnership may consist of one or more persons called general partners, and one or more persons called special partners.

1887 R. S. Sec. 3271; 1885, 13th Ses. p. 148.

**Section 2751. Certificate, What Must State:** Persons desirous of forming a special partnership must severally sign a certificate stating:



First. The name under which the partnership is to be conducted;

Second. The general nature of the business intended to be transacted;

Third. The names of all the partners, and their residences, specifying which are general and which are special partners;

Fourth. The amount of capital which each special partner has contributed to the common stock;

Fifth. The periods at which such partnership will begin and end.

1887 R. S. Sec. 3272; 1885, 13th Ses. p. 148.

NAME: The "full name" of a member of a limited partnership is signed to a statement as required, when signed in the form habitually used by him in business and by which he is

known in the community, although it consists only of a surname and initials. *Laflin & Rand Powder Co. v. Steytler*, 146 Pa. 434, 14 L. R. A. 690, 28 Atl. 215. See discussion of requirements of this section in *Am. & Eng. Enc. of Law*, Vol. 13, page 808 and note.

### **Section 2752. Certificate to be Acknowledged and Recorded, Effect of False Statements:**

Certificates under the last Section must be acknowledged by all the partners, before some officer authorized to take acknowledgments of deeds, and recorded in the office of the recorder of the county, in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it is recorded, must be recorded in like manner in the office of the recorder in every such county. If any false statement is made in any such certificate all the persons interested in the partnership are liable, as general partners, for all the engagements thereof.

1887 R. S. Sec. 3273; 1885, 13th Ses. p. 148.

**Section 2753. Affidavit of Each Partner Must be Filed:** An affidavit of each of the partners, stating that the sums specified in the certificate of the partnership as having been contributed by each of the special partners, have been actually and in good faith paid, must be filed in the same office with the original certificate.

1887 R. S. Sec. 3274; 1885, 13th Ses. p. 148.

**AFFIDAVIT OF PAYMENT OF CAPITAL:** Where the contribution of a special partner consists of a stock of groceries or notes, an affidavit that he "Has contributed to such firm the sum of \$12,000, which said sum has been actually and in good faith contributed to the business," contains a false statement and is not sufficient to relieve such special partner from liability as a general partner.—*Holliday v. Union Bag & Paper Co.* 3 Colo. 342. Under a statute for the formation of limited partnerships, which requires the capital of the special partner to be paid in actual cash on the formation, and provides that if there is any false statement in the certificate and affidavits of formation, the special partner

shall be liable as a general partner, a partnership was formed by a certificate and affidavits dated and filed December 23, 1870, to commence January 1, 1871; the affidavits and certificate stated that the special partner's capital had been actually and in good faith paid in cash; in fact, the special partner gave his checks for the amount, dated December 31, 1870, which were paid January 2, 1871. Held, that the statements were false with in the meaning of the statute, and the special partner was liable as a general partner for the debts of the firm.—*Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158. On the formation of a limited partnership, the special partner gave his certified check for \$10,000, the amount of his capital, which was deposited to the credit of the new firm. Afterwards,

on the same day, the firm gave him their checks on the same bank for some \$7,600, the amount appearing to his credit on the books of the former firm, composed of the same members, which was paid from the \$10,000 deposited by the firm, they having no other funds

in the bank. Held, that this was not an actual cash contribution as required by the statute, and the special partner was liable as a general partner.—*Line-weaver v. Slagel*, 64 Md. 465, 54 Am. Rep. 775, 2 Atl. 693.

### **Section 2754. When Special Partnership is Formed:**

No special partnership is formed until the provisions of the last five Sections are complied with.

1887 R. S. Sec. 3275; 1885, 13th Ses. p. 149.

**STATUTORY REQUIREMENTS** A person who seeks exemption from the liability of a general partner must show a strict compliance with the requirements of the statutes providing for special partnerships.—*Holliday v. Union Bag & Paper Co.* 3 Colo. 342; *Van Horne v. Corcoran* (Pa.), 4 L. R.

A. 386, 18 Atl. 16. A complaint which does not allege that the certificate required by law has been made and filed does not allege the existence of a special partnership.—*Prince v. Lamb* (Cal.), 60 Pac. 689. See article on limited partnership in Am. & Eng. Ency. of Law, Vol. 13, p. 802. Also *Rouse v. Detroit Cycle Co.* (Mich.), 38 L. R. A. 794, 69 N. W. 511.

### **Section 2755. Certificate Must be Published:**

The certificate mentioned in this Chapter or a statement of its substance, must be published in a newspaper printed in the county where the original certificate is filed, and if no newspaper is there printed, then in a newspaper in this State published nearest thereto. Such publication must be made once a week, for four successive weeks, beginning within one month from time of filing the certificate. In case such publication is not so made, the partnership must be deemed general.

1887 R. S. Sec. 3276; 1885, 13th Ses. p. 149.

**EFFECT OF FAILURE TO PUBLISH** The legal existence of a special partnership does not depend upon

the notice of its formation. The only effect of the failure to publish the required notice was that partnership should be deemed general.—*Tracey v. Tuffy*, 134 U. S. 206, 33 L. Ed. 879.

### **Section 2756. Affidavit of Publication, Effect When Filed:**

An affidavit of the making of the publication mentioned in the preceding Section made by the printer, publisher or chief clerk of the newspaper in which such publication is made, may be filed with the county recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated.

1887 R. S. Sec. 3277; 1885, 13th Ses. p. 149.

### **Section 2757. Renewal of Special Partnership:**

Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation.

1887 R. S. Sec. 3278; 1885, 13th Ses. p. 149.

The renewal or continuance of a limited partnership operates merely as an extension for the designated period of the partnership already formed, and in practical effect is the same as if such time had been embraced within the terms of the original formation.—*Fifth Ave. Bank v. Colgate*, 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712 and

note. The impairment of the capital stock furnished to a limited partnership by a special partner, without his fault, does not prevent the renewal or continuance of the partnership, and a statement in the certificate or affidavit of renewal that the capital is unimpaired is mere surplusage, which, although false does not render him liable as a general partner to one who has not been induced thereby to give credit to



the firm.—Fifth Ave. Bank v. Colgate, 64 Md. 465, 54 Am. Rep. 775, 2 Atl. 693. supra. See also Lineweaver v. Slagle,

**Section 2758. Who to Do Business:** The general partners only have authority to transact the business of a special partnership.

1887 R. S. Sec. 3279; 1885, 13th Ses. p. 149.

**SPECIAL PARTNER HAS NO AUTHORITY** A special partner has no authority to transact any business on account of partnership, nor to make the partnership liable to his contracts as such special partner only.—Colum-

bia Land & Cattle Co. v. Daly (Kan.), 26 Pac. 1042. A contract made in the name and for the benefit of those who afterwards become its members is enforceable as a contract made by them as general partners.—Abbott v. Hapgood (Mass.), 5 L. R. A. 586, 22 N. E. 907.

**Section 2759. Rights of Special Partners:** A special partner may at all times investigate the partnership affairs, and advise his partners or their agents, as to their management.

1887 R. S. Sec. 3280; 1885, 13th Ses. p. 149.

**Section 2760. Special Partner May Loan to Partnership:** A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.

1887 R. S. Sec. 3281; 1885, 13th Ses. p. 149.

**Section 2761. General Partners May Sue and be Sued Alone:** In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners.

1887 R. S. Sec. 3282; 1885, 13th Ses. p. 149.

Persons who have failed to make their concern a limited partnership

may be sued as joint partners for the debts of the firm.—Van Horn v. Corcoran (Pa.), 4 L. R. A. 386, 18 Atl. 16.

**Section 2762. Special Partner not to Withdraw Capital:** No special partner may under any pretense, withdraw any part of the capital invested by him in the partnership, during its continuance.

1887 R. S. Sec. 3283; 1885, 13th Ses. p. 149.

For discussion of this section see Am. & Eng. Ency. of Law, Vol. 13, p. 821.

**Section 2763. Interest and Profits of Special Partner:** A special partner may receive such lawful interest and such proportion of profits as may be agreed upon if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses.

1887 R. S. Sec. 3284; 1885, 13th Ses. p. 149.

**Section 2764. Result of Withdrawing Capital:** If a special partner withdraws capital from the firm contrary to the provisions of this Subdivision, he thereby becomes a general partner.

1887 R. S. Sec. 3285; 1885, 13th Ses. p. 149.

**Section 2765. Transfer, when Void:** Every transfer of the property of a special partnership, or of any partner therein, made after or in contemplation of the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner, over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created, or security given in like manner and with the like intent, is in like manner void.

1887 R. S. Sec. 3286; 1885, 13th Ses. p. 149.

See Am. & Eng. Ency. of Law, Vol. 13, p. 829.

**Section 2766. Liability of General Partners:** The general partners in a special partnership are liable to the same extent as partners in a general partnership.

1887 R. S. Sec. 3287; 1885, 13th Ses. p. 150.

**Section 2767. Liability of Special Partner:** The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows:

First. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable as a general partner to all creditors to the firm:

Second. If he has wilfully interfered with the business of the firm, except as permitted in this Chapter, he is liable in like manner; or

Third. If he has wilfully joined in or assented to an act contrary to any of the provisions of this Chapter, he is liable in like manner.

1887 R. S. Sec. 3288; 1885, 13th Ses. p. 150.

**RESPONSIBILITY OR LIABILITY OF SPECIAL PARTNERS:** A partner in commendam does not become responsible for liability created by the active partner after the expiration of such partnership, from the fact that he fails to have a settlement of its affairs; nor is such partner liable as a general partner if he allows his money to remain in the firm after its expiration, believing himself to be a partner in commendam, and liable only for the amount invested unless he has done or permitted some act which could have induced creditors to believe him to be a general partner.—*Slocomb v. DeLizardi*, 21 La. Ann. 355, 99 Am. Dec. 740.

The interest of a special partner in a limited partnership cannot be levied upon and sold under an execution issued in an attachment suit brought against the members of the partnership.—*Harris v. Murray*, 28 N. Y. 574, 86 Am. Dec. 268. The statute in fixing the liability of a special partner on account of non-compliance with its provisions, does not change his special partnership into a general one, but simply makes him liable as a general partner to creditors.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 33 L. Ed. 57. For a discussion of the liability of the special partner under a contract made in a foreign state, see *King v. Serria*, 69 N. Y. 24, 25 Am. Rep. 128.

**Section 2768. When Liable as a General Partner:** When a special partner has unintentionally done any of the acts mentioned in the last Section, he is liable as a general partner to any creditor of the firm who has been actually misled thereby to his prejudice.

1887 R. S. Sec. 3289; 1885, 13th Ses. p. 150.

**Section 2769. Who May not Question Existence of Special Partnership:** One who, upon making a contract with a



partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by this Chapter.

1887 R. S. Sec. 3290; 1885, 13th Ses. p. 150.

**Section 2770. When Special Partnership becomes General:** A special partnership becomes general if, within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate of such fact duly verified and signed by one or more of the partners, is not filed with the county recorder with whom the original certificate of the partnership was filed, and notice thereof published as is provided in this Chapter for the publication of the certificate.

1887 R. S. Sec. 3291; 1885, 13th Ses. p. 150.

**Section 2771. New Special Partners, How Admitted:** New special partners may be admitted into a special partnership upon a certificate stating the names, residences and contributions to the common stock of each of such partners, signed by each of them, and by the general partners, verified, acknowledged, or proved, according to the provisions of this Chapter, and filed with the county recorder with whom the original certificate of partnership was filed.

1887 R. S. Sec. 3292; 1885, 13th Ses. p. 150.

**Section 2772. Dissolution of Special Partnership:** A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution by the act of the partners is complete until a notice thereof has been filed and recorded in the office of the county recorder, with whom the original certificate was recorded, and published once in each week for four successive weeks in a newspaper printed in each county where the partnership has a place of business.

1887 R. S. Sec. 3293; 1885, 13th Ses.      Dissolution: Am. & Eng. Ency. of Law, Vol. 13, p. 839.

**Section 2773. Name of Special Partner not to be Used in Firm Name:** The name of a special partner must not be used in the firm name of partnership, unless it be accompanied with the word "limited."

1887 R. S. Sec. 3294; 1885, 13th Ses.      Name: Am. & Eng. Ency. of Law, Vol. 13, p. 817.

#### MINING PARTNERSHIPS.

**Section 2774. When Mining Partnership Exists:** A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom, actually engage in working the same.

1887 R. S. Sec. 3300.

**MINING PARTNERSHIP—EVIDENCE TO ESTABLISH:** While a partnership for the purpose of dealing in mining property may be proved by parol, the evidence to establish such partnership, when denied, must be clear and certain. The evidence in these cases examined and held to be sufficient to establish such partnership. —*Mayhew v. Burke*, 2 Idaho, 1056, 29 Pac. 106; *Knott v. Burke*, 2 Idaho, 1056, 29 Pac. 106.

Section cited in *Haskins v. Curran* (Idaho), 43 Pac. 559.

**THE RELATION OF MINING PARTNERSHIP:** The relation differs from that of tenants in common in this: that the co-owners in a mine are partners without agreement to become such, while tenants in common are not, except by agreement. The necessity for this relationship arises from the character of the property, as in working a mine the very life, the substance, the sole value of the property is taken out and carried away, leaving the ground from which the precious metal is taken, barren and worthless for mining purposes, which in this case, as in others of like nature, is its sole and only value.—*Hawkins v. Spokane Hydraulic Min. Co.* 2 Idaho 970, 28 Pac. 433. A mining partnership, by virtue of our statutes, in all of its essential elements is precisely like a corporation.—*Hawkins v. Spokane Hydraulic Min. Co.* (Idaho), 33 Pac. 40-42. See *Higgins v. Armstrong* (Colo.), 10 Pac. 232; *Hurd v. Thompkins* (Colo.), 30 Pac. 247. A mining partnership arises only when the owners of the mine engage together in working it, and a mere contract by which a third person agrees with them to work the mine to pay one-half the expense thereof, and receive one-half the prod-

uct of the mine for his labor, does not constitute a mining partnership between the parties to the contract, but is a contract for working the mine on shares.—*Stuart v. Adams*, 89 Cal. 367, 26 Pac. 970; *Dorsey v. Newcomer*, 121 Cal. 213, 53 Pac. 557; *Berry v. Woodburn*, 107 Cal. 504, 40 Pac. 802. It is not necessary that all the co-owners in a mining claim shall engage in working the mine together or separately; the partnership exists without an agreement either expressed or implied.—*Hawkins v. Spokane Hydraulic Min. Co.* 2 Idaho, 970, 28 Pac. 433. To constitute a mining partnership, two or more persons must not only own or acquire a mining claim for the purpose of working it, but must actually engage in working the same; and the fact that one part owner of a claim is charged by another with wrongfully extracting ore from a portion of the vein, the apex of which is alleged to be within the claim, does not create the relationship of mining partners between the parties.—*Anaconda Copper Min. Co. v. Butte & B. Min. Co.* (Mont.), 43 Pac. 924. When the several owners of a mine co-operate in working it, a mining partnership is thereby established.—*Higgins v. Armstrong* (Colo.), 10 Pac. 232. The verbal conveyance of a one-third interest in a mining claim by a party who retains the other two-thirds, the purchaser agreeing to pay the price therefor out of the product of the property; the working of all parties together in developing the mine, a time book being kept in which were entered the wages accruing to each party, and the payment of sums of money by the purchaser agreeably to the contract, are facts sufficient to make out a mining partnership.—*Southmayd v. Southmayd* (Mont.), 5 Pac. 318.

**Section 2775. No Agreement Necessary:** An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.

1887 R. S. Sec. 3301.

See note to preceding section.

*G. V. B. Mining Co. v. First National Bank*, 95 Fed. 35.

**Section 2776. Profits and Losses, How Shared:** A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.

1887 R. S. Sec. 3302.

**ACCOUNTING:** An account may be compelled by either of the parties hold-

ing a majority or minority interest in a mine, of work done and metals extracted.—*Hawkins v. Spokane Hydr-*



lic Min. Co. 2 Idaho 970, 28 Pac. 433.

G. V. B. Mining Co. v. First National Bank, 95 Fed. 35.

**Section 2777. Liens of Partners and Creditors:** Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof, and for money advanced by him for its use. A lien exists in favor of the creditors notwithstanding there is an agreement among the partners that it must not.

1887 R. S. Sec. 3303.

**LIEN OF PARTNER:** The lien of a mining partner does not give to either partner a right of possession of the partnership property to the exclusion of the other. The lien may exist in favor of one partner, although the partnership property is in the actual possession of the other.—*Morganstern v. Thrift*, 66 Cal. 577, 6 Pac. 689. Civil Code Cal. 2442, providing that every general partner is jointly liable to third persons for firm debts, applies to members of a mining partnership.—*Stuart v. Adams*, 89 Cal. 367, 26 Pac. 970. The law of mining partnerships differs in some respects from that of common commercial partnerships; but, upon the point that the acts of one partner in regard to the business bind the co-partners, the laws agree.—*Higgins v. Armstrong* (Colo.), 10 Pac. 232. Sec. 2453 of the Civil Code, which enacts that the lia-

bility of the general partner for the acts of his co-partners continues after dissolution of the partnership in favor of persons who have had dealings with, and given credit to the partnership, until they have had personal notice of the dissolution, applies to a mining partnership, which is dissolved by a transfer of its property to a corporation. And the record of such deed does not give constructive notice of the dissolution to those who have had dealings with the mining partnership, but in order to exempt one of the mining partners from continuous liability for the acts of his co-partners toward a laborer who had worked for the partnership, the personal notice to the laborer of the dissolution of the mining partnership must have been actual.—*Dellapiza v. Foley*, 112 Cal. 381, 44 Pac. 727; *G. V. B. Mining Co. vs. First National Bank*, 95 Fed. 35.

**Section 2778. Mining Ground is Partnership Property:** The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property.

1887 R. S. Sec. 3304.

The partnership property of a mining partnership, not formed by actual agreement, but by the actual working of a mining claim owned or acquired by two or more persons for the purpose of working the same, consists only of the mining ground so owned or acquired and actually worked, unless other property has been acquired by the partnership for the purpose of aiding in working it, such as a mill or mill site, or other mining property is

acquired by it for the purpose of working it with the mining ground already being worked and so situated that it can be worked with the original claim, as parts of one mine, or has been acquired with partnership funds.—*Dorsey v. Newcomer*, 121 Cal. 213, 53 Pac. 557.

A mere agreement to work a mining claim in the future, upon the happening of a contingency, does not make it partnership property.—*Id.* *G. V. B. Mining Co. v. First National Bank*, 95 Fed. 35.

**Section 2779. Partnership not Dissolved by Sale of Interest:** One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

1887 R. S. Sec. 3305.

**RELATIONS BETWEEN PARTNERS:** In the absence of a special contract there is no relation of trust between tenants in common of mining property, who are partners merely in the working thereof, which prevents

one of them, when selling the property, from receiving a higher price for his interest than is paid the others.—*Harris v. Lloyd* (Mont.), 28 Pac. 736; *G. V. B. Mining Co. v. First National Bank*, 95 Fed. 35,

**Section 2780. Purchaser takes Subject to Lien, when:**

A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof or advances made for the benefit of his partnership unless he purchased in good faith, for a valuable consideration, without notice of such lien.

1887 R. S. Sec. 3306.

**Section 2781. Purchaser takes with Notice of Liens, when:** A purchaser of the interest of a partner in a mine when the partnership is engaged in working it, takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

1887 R. S. Sec. 3307.

**Section 2782. No Member Can Bind Partnership Except when:** No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership except by express authority derived from the members thereof.

1887 R. S. Sec. 3308.

Note by Commission The effect of this section seems to be simply a limitation upon the power of one partner to bind another, within the scope of the partnership business, and in this respect differs from a general partnership. The liability of each partner for

the debts of the partnership is joint, as in general partnerships. See Sec. 2777, and note. Debts can not be contracted by one partner as in a general partnership, but when once contracted by authority of the partnership, each partner is jointly liable.

**Section 2783. Majority Shares Governs Conduct of Business:** The decision of the members owning a majority of the shares or interests in a mining partnership, binds it in the conduct of its business.

1887 R. S. Sec. 3309.

**CONTROL OF BUSINESS** Under the statutes of Idaho, the party or parties owning a majority interest in a mining claim or mine, in the absence of any specific agreement to the contrary, have the right to the control and management of the same, subject to the laws of the United States and of this State.—*Hawkins v. Spokane Hydraulic Min. Co. (Idaho)*, 33 Pac. 40. It was held in *Hawkins v. Spokane Hydraulic Min. Co.* 2 Idaho, 970, 28 Pac. 433, that where the plaintiff was the owner of a seven-eighths interest in a placer

mining claim and the defendant of a one-eighth interest, that the plaintiff was entitled to an injunction to restrain the defendant from working such claim except in the manner directed by the plaintiff. A member of a mining partnership is liable as between the parties, for his proportionate share of the salary of an employee appointed by a majority of the members over his objection, such partner having reaped the benefit of his employment.—*Patrick v. Weston*, 22 Colo. 45, 43 Pac. 446. See also *Dougherty v. Creary*, 30 Cal. 290.

**Section 2784. Prospecting Contracts, when Constructive Notice:** Written contracts relating to prospecting or mining, or to the formation of a co-partnership for that purpose, when signed by the parties thereto and indorsed by at least one witness, may be recorded in the office of the county recorder of the county wherein it is proposed to prosecute the business of said co-partnership, or where the property affected by such contract is situated. Such record shall be constructive notice to all persons of the matters contained in such contract or co-partnership agreement.

1899, 5th Ses. p. 366.



GRUB STAKES, WHAT ARE: See *Berry v. Woodburn*, 107 Cal. 504, 40 Pac. 802; *Crow v. Wilson*, 22 Nev. 385, 40 Pac. 1076; *Miller v. Butterfield*, 79 Cal.

62, 21 Pac. 543; *Page v. Summers*, 70 Cal. 121, 12 Pac. 120; *Prince v. Lamb* (Colo.), 60 Pac. 689.

## CHAPTER CXIII.

### LIENS.

#### Section.

##### GENERAL PROVISIONS.

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**Section 2785. Lien Defined:** A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act.

1887 R. S. Sec. 3325.

GENERAL NATURE OF LIENS:  
See *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Andrews v. Doe*, 6 Howard 554, 38 Am. Dec. 450; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Bidwell v. Webb*, 10 Minn. 59, 88 Am. Dec. 56;

*Sullivan v. Clifton*, 55 N. J. L. 324, 39 Am. St. Rep. 652, 26 Atl. 964; *Lowe v. Woods*, 100 Cal. 408, 38 Am. St. Rep. 301, 34 Pac. 959; *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 96.

**Section 2786. General or Special:** Liens are either general or special.

1887 R. S. Sec. 3326.

**Section 2787. General Lien Defined:** A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.

1887 R. S. Sec. 3327.

A general lien is one which exists for a general balance of account, and does not necessarily arise out of dealings with the particular property sought to be charged. They may arise from a usage or custom of trade; from an express contract; from the manner of dealing between parties in the particular case; or, where the de-

fendant has acted as factor. The principal general liens are those of attorneys, factors and brokers, and warehousemen and wharfingers.—Am. & Eng. Enc'y. of Law, Vol. 13, p. 577. General liens are strictly construed; particular or special liens are liberally construed.—Am. & Eng. Enc'y. of Law, Vol. 13, p. 576.

**Section 2788. Special Lien Defined:** A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto.

1887 R. S. Sec. 3328.

Specific lien: See *Lincoln v. Purcell*, 73 Am. Dec. 196.

**Section 2789. Right of Holder of Special Lien when he Pays Prior Lien:** Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists.

1887 R. S. Sec. 3329.

**Section 2790. Certain Contracts Subject to this Sub-**



**division:** Contracts of mortgage and pledge, are subject to all the provisions of this Subdivision.

1887 R. S. Sec. 3330.

**Section 2791. Liens on Future Interests:** An agreement may be made to create a lien upon property not yet acquired or not yet in existence, by the party agreeing to give the lien. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of said interest.

1887 R. S. Sec. 3331.

Chattel mortgage on crops to be grown: Sec. 2818.

Whenever a person by a contract intends to create a lien upon personal property to be acquired by him, the

lien attaches in equity upon the particular property as soon as he acquires a title thereto.—*Bibend v. L. & L. F. & L. Ins. Co.* 30 Cal. 79. See *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706.

**Section 2792. Lien May be Created to Take Immediate Effect:** A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence.

1887 R. S. Sec. 3332.

**MORTGAGE TO SECURE FUTURE ADVANCES:** A note and mortgage given in good faith for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances to be made by the mortgagee, is not fraudulent in law as to the creditors of the mortgagor because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances.—*Tully v. Harloe*, 35 Cal. 302. A mortgage knowingly given for a sum greater than is due and in good faith, as a pretended security for advances, is fraudulent in law as to the creditors of the mortgagor.—*Id.* A mortgage given in good faith for the purpose of securing future advances need not express its object upon its face, although it is better it should.—*Id.* A chattel mortgage given for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances, is not fraudulent in law as to creditors of the mortgagor, because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances. Whether such mortgage was given in good faith is a question for the jury.—*Wood v. Franks*, 67 Cal.

32, 7 Pac. 50; *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, and cases cited, 11 Am. St. Rep. 288 and note. A mortgage of chattels to secure future advances made on the strength of a parol agreement, the object not being expressed in the mortgage, is void pro tanto, as against creditors.—*Divver v. McLaughlin*, 2 Wend. 596, 20 Am. Dec. 655 and note. See *O'Farrall v. Kennedy* (Idaho), 49 Pac. 313.

**NOTICE OF SUBSEQUENT LIEN:** A mortgage made in good faith to cover future advances of money or materials, or future indorsements, is a valid lien from the date of its execution, if properly recorded, as against subsequent purchasers or incumbrancers, except as to advances made after actual, as distinguished from record, notice of a subsequent incumbrance, though the mortgage does not disclose upon its face that it is given in part for future advances, if the amount of liability is expressly limited, and though the agreement for advances be not in writing. If the mortgage discloses upon its face that it is to secure future advances, the amount need not be set out, and subsequent incumbrancers must ascertain the extent of the lien or suffer the consequences.—*Tapai v. Demartini*, 77 Cal. 383, 19 Pac. 641.

**Section 2793. Lien Transfers no Title to Property:** Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.

1887 R. S. Sec. 3333.

**MORTGAGE EFFECT ON TITLE:** A mortgage upon real estate creates

only a lien in favor of the mortgagee, and the legal title does not pass until after foreclosure and sale.—*Bauldoff v.*

Griswold (Okl.), 60 Pac. 223. So, it was held in *Bidwell v. Webb*, 10 Minn. 59, 88 Am. Dec. 56, that a lien upon land is not estate or interest therein, but merely a charge upon it. The term lien is now used to designate all various charges of debts upon land or personality, created by statute or recognized in chancery and maritime law, although neither connected with nor dependent upon possession. It has a more extended signification than at common law. Common law liens are mere rights to retain property until the specific debt is satisfied, and cannot continue without possession.—*Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431. The supreme court of California in *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, says "In this state a mortgage conveys no estate in the land, but is a simple lien upon the property. This being true, a transaction of this kind is not within the provisions of the Code that an express trust in land can not be created except by an agreement in writing or a parol agreement fully executed." The same doctrine laid down in this section and in California is also held to be a settled doctrine in New York. See *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519 and cases cited on page 521. In the same case the court says: "But while no title in a strict sense vests in a mortgagee of land until foreclosure, yet his interest is in some cases treated and regarded as a title, for the purpose of protecting

and enforcing the equities between parties."

Where the English doctrine prevails, that the mortgage conveys the legal title to the mortgaged premises, the right of the mortgagor to an account of the rents and profits of the lands received of the mortgagee is purely and exclusively of equitable recognition. At law, the mortgagee is the owner of the estate and takes the rents and profits in that character. In equity the mortgagor is regarded as the owner until foreclosure and his right to an account is incident to his right of redemption.—2 Washb. on Real Property, 161, 205; *Seaver v. Durrant*, 39 Vt. 103. *Parsons v. Welles*, 17 Mass. 419, all cited in *Hubbell v. Moulson*, supra. Notwithstanding the above construction in California to the effect that the mortgage conveys no title, it is held in that state that a mortgage purporting to convey in fee all the estate, right, title and interest of the mortgagor in a parcel of land operates upon an interest and title subsequently acquired by the mortgagor, and this is true although the title when the mortgage was made was in the government of the United States, and was acquired by the mortgagor after a foreclosure of the mortgage.—*Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Sherman v. McCarthy*, 57 Cal. 507; *Vallejo Land Ass'n. v. Viera*, 48 Cal. 572; *Solomon v. Franklin et al.* 62 Pac. 1030.

**Section 2794. Certain Contracts Void:** All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void.

1887 R. S. Sec. 3334.

**RIGHT TO REDEEM:** The right to redeem can not be barred by any agreement at the time of the contract, that the purchaser should, in default of the debtor, become the absolute owner, if the subject was once redeemable.—*Gillis v. Martin* (N. C.), 2 Dev. Eq. 470, 25 Am. Dec. 729. Neither can the equity of redemption be foreclosed by any form of words used in an in-

strument, when the real intention of the parties was to secure the payment of a debt, not to extinguish it.—*Baxter v. Willey*, 9 Vt. 276, 31 Am. Dec. 623. So a restriction of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage and void.—*Johnston v. Gray*, 16 S. & R. 361, 16 Am. Dec. 577; *Solomon v. Franklin et al.* 62 Pac. 1030.

**Section 2795. Personal Obligation not Implied by Creation of Lien:** The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security.

1887 R. S. Sec. 3335.

**Section 2796. Priority of Mortgage for Purchase Price:** A mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws.



1887 R. S. Sec. 3336.

The term "price of real property" as used in this section is the money paid for real property on the debt created by the purchase thereof.—*Kneen v. Halin* (Idaho), 59 Pac. 14.

**PURCHASE MONEY:** Where a party advances purchase money for a homestead occupied by the vendee, upon his promises to execute a mortgage to secure the re-payment of such money when he obtains a deed, and he afterwards refuses to do so, the purchase money so advanced becomes a lien against the homestead, and may be enforced by the person advancing the money, and against it the vendee cannot maintain a homestead right.—*Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; an extensive note on this subject is found on page 574. In *Burnap v. Cook*, 16 Iowa, 149, 85 Am. Dec. 507, it was held that the homestead right is subordinate to that of vendor for his unpaid purchase money. To the same effect is *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493, where it was held that the debt for purchase money of homestead is not a debt contracted after the purchase of the homestead so as to render the property exempt as to such debt. But in *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266, it is held that a mortgage to cover a loan which was used to pay for the property se-

cured is not a purchase price mortgage within the Civil Code giving such mortgages priority over other liens, subject to the recording laws, unless the money was loaned for the express purpose of paying for such property. Where A., who is a married man, is occupying premises as a tenant of B. and concludes to purchase the same, and to do so borrows the whole of the purchase money from C. and to secure the payment thereof to C., mortgages the premises to him, but the wife does not sign the mortgage: Held, that the homestead right was subject to the mortgage. The deed and mortgage, being simultaneous, were but parts of the same transaction. — *Lassen v. Vance*, 8 Cal. 271. A mortgage given upon hotel furniture by the purchaser thereof to a lender of money, who advances it expressly to enable the purchaser to buy the furniture from the vendors, is a mortgage given to secure the purchase money within the meaning of the Code and is valid.—*Blaisdell v. McDowell*, 91 Cal. 285, 27 Pac. 656. A clear title to a homestead cannot vest until the payment of the purchase money. So held in a case where a new mortgage was placed upon the property to secure money to pay the original mortgage that was given for the purchase price.—*Carr v. Caldwell*, 10 Cal. 380.

**Section 2797. Right of Redemption:** Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed.

1887 R. S. Sec. 3337.

**WHO MAY REDEEM:** The mortgagor has the right to redeem where the mortgagee becomes purchaser under a sale by virtue of a power contained in the mortgage.—*Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342.

**GRANTOR OF MORTGAGOR:** One must show a good title in himself, and a legal right to redeem, before he, though holding the title of a mortgagor, can effect the discharge of the mortgage or remove prior incumbrances.—*Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295.

**HEIRS OF MORTGAGOR:** Equity of redemption descends to heirs of deceased mortgagor, and is not barred by a sale of the land, under a decree of foreclosure, in an action in which the administrator of such deceased mortgagor is the defendant, and the heirs are not joined.—*Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

**JUDGMENT CREDITOR:** A judgment upon full consideration entitles the judgment creditor to the privilege

of the redemptioner, though entered solely for the purpose of giving him a right to redeem.—*Snyder v. Warren*, 2 Cowen, 518, 14 Am. Dec. 519.

**WHAT MAY BE REDEEMED:** A mortgagor to secure a debt due the mortgagee, mortgaged to him two pieces of land by separate deeds, a creditor of the mortgagor levied an execution on the latter's right in one of the pieces; it was held that the grantor was entitled to redeem both, by paying the whole mortgage debt; but could not redeem the piece set off to him on execution, by paying such proportion of the whole debt as that piece bore in value to the whole mortgaged premises.—*Franklin v. Gorham*, 2 Day, 142, 2 Am. Dec. 86.

Junior encumbrancers: See next section.

**WHEN THE LEGAL ESTATE CEASES:** The legal estate exists in the mortgage debtor after expiration of the time to redeem until execution of the conveyance to the purchaser.—*McMillan v. Richards*, 9 Cal. 365; *Cum-*

mings v. Coe, 10 Cal. 529; Goodenow v. Ewer, 16 Cal. 461. During the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the purchaser as an owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation, in short, the entire beneficial interest in the property except the actual possession. He has, both before and after the period of redemption expires, an estate in the land purchased which may be levied on and sold on an execution running against the property.—Page v. Rogers, 31 Cal. 294. During the time for redemption, legal title is in the mortgagor, and may be conveyed to him, and the grantee becomes entitled to redeem, without paying to the mortgagee the specified portion of the judgment under

which the property was sold to him, and the judgment for the deficiency is not a lien on the land.—Simpson v. Castle, 52 Cal. 644. A title acquired by or made pursuant to a sale under decree of foreclosure of mortgage commences by relation at the date of the mortgage.—People's Savings Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; Iron Works v. Davidson, 73 Cal. 389-392, 15 Pac. 20.

**LIMITATIONS BEGIN WHEN:** See Grattan v. Wiggins, 23 Cal. 16; Coster v. Brown, 23 Cal. 143; Taylor v. McClain, 60 Cal. 651; Allen v. Allen, 95 Cal. 184, 30 Pac. 213; Koch v. Briggs, 14 Cal. 257; Cunningham v. Hawkins, 24 Cal. 403. Equity may open a decree and extend the time for the redemption of a mortgage.—Bridgeport Savings Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688.

### **Section 2798. Right of One Holding Inferior Lien:**

One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might, from the superior lien; and,
2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

1887 R. S. Sec. 3338.

**JUNIOR INCUMBRANCERS:** Second mortgagees having acquired by foreclosure the right to redeem mortgaged premises, have such right after the time allowed for redemption has expired, notwithstanding a decree of foreclosure obtained without service of process or legal notice to them, by the defendants who by purchase represent the interest of the first mortgage.—Bridgeport Savings Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688. The junior mortgagee has a right to redeem under the statute, when not made a party to a suit to foreclose a prior mortgage, and he also retains his equitable right to redeem, unaffected by the foreclosure. If made a party to the foreclosure suit, his equitable right to redeem is barred, but he is still a redemptioner under the statute.—Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Eldridge v. Wright, 55 Cal. 531. If a sheriff at a foreclosure sale sells as personal property that which is in fact

real property, the remedy of a junior mortgagee is to attack the sale itself as invalid and not by a suit to redeem.—Horn v. Indianapolis National Bank, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231 and note on page 243 as to who may redeem from execution or foreclosure sale. A judgment creditor is not entitled to treat a prior fraudulent conveyance by the judgment debtor as void, and to sell the land conveyed under execution; and if he does, and bids it in at the sale, he acquires no rights as against a subsequent judgment creditor who proceeded by creditors' suit to set the conveyance aside, and sold the land to satisfy his judgment, bidding it in himself. Neither does he become a successor in interest or creditor of the debtor's grantee, so as to entitle him to redeem from a sale under a mortgage executed by such grantee.—Preston-Parton Milling Co. v. Dexter Horton & Co. (Wash.), 60 Pac. 412.

### **Section 2799. When Restoration Extinguishes Lien:**

The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of



the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith, and for a good consideration.

1887 R. S. Sec. 3339.

#### POSSESSION OF PERSONALTY.

Lien upon personalty at common law is founded on possession, actual or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged. It involves the right to an uninterrupted possession while it exists, and is lost or waived when possession is voluntarily surrendered.—*Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694; *Jenkins v. Eichelberger*, 4 Watts, 121, 28 Am. Dec. 691; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431. As a general rule, the delivery back of the possession of the thing

pledged, with the consent of the pledgee, the pledge is still valid; and if it is delivered back to the pledgor in a new character, as a special bailee or agent, the pledgee will be entitled to the pledge, not only against the owner but as against third persons.—*Palm-tag v. Doutrick*, 59 Cal. 154. Where two parties own wagons in common and one pledges his half to the other for advances, if the pledgee keeps the wagons on his premises, marks them with his name, and exercises control over them, the mere fact that the pledgor is painting them, does not show a surrender of possession by the bailee.—*Waldie v. Doll*, 29 Cal. 556. See also *Treadwell v. Davis*, 34 Cal. 601.

### MORTGAGES IN GENERAL.

**Section 2800. Mortgage Defined:** Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession.

1887 R. S. Sec. 3350.

Foreclosure of mortgages: Code Civil Proc. Sec. 3331 et seq.

What title passes: See note to Section 2793.

#### MORTGAGE, HOW REGARDED:

A mortgage was regarded at common law as a conveyance of conditional estate, and upon breach of its conditions, the estate became absolute; but to relieve the hardship of this rule, courts of equity give to the mortgagor a right to redeem upon payment of the debt secured, within a reasonable time.—*Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Fogarty v. Sawyer*, 17 Cal. 589.

#### MORTGAGE, WHAT CONSTITUTES:

An instrument reciting that defendant, to secure a certain indebtedness to plaintiff, conveys to him certain lands, that the agreement is on the express condition that, if defendant conveys to plaintiff certain other land, the instrument shall be void, and that, when defendant shall have conveyed to plaintiff the land, he shall pay defendant a certain sum, and, after defendant has made certain improvements on the land, plaintiff shall pay him a further sum, is a mortgage, entitling plaintiff to foreclose on default in payment or conveyance on the other land, without demand, for such conveyance, or tender of the price to be paid thereon.—*Purser v. Eagle Lake L. & I. Co.* 111 Cal. 139, 43 Pac. 523. The court will not look to the form of the instrument, but to its real character as having been given for the purpose

of securing indebtedness; and conceding that the new agreement bears no visible ear marks of a mortgage, if the effect be, as the plaintiff alleges, and the demurrer admits, that it was entered into for the purpose of such security, no form of words, however adroit, can estop the plaintiff from completing and proving that fact.—*Peninsula, etc. Co. v. Pacific S. W. Co.* 123 Cal. 689, 56 Pac. 604.

It may be laid down as a general rule, subject to few exceptions, that whenever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered, in equity, as a mortgage.—*Wilcox v. Morris* (N. C.), 1 Mur. 116, 3 Am. Dec. 678. A deed conveying land, and in express terms reserving to the grantor a lien to secure the payment of two promissory notes for a part of the price, creates an equitable mortgage upon the land.—*Dingley v. Bank of Ventura*, 57 Cal. 467. An instrument may be recorded as a mortgage, although no other written evidence of debt exists than that furnished by the instrument itself. So held where a deed is made of certain premises, but the grantor remains in possession and prior to the execution and delivery of the deed the grantee endorses upon its back an agreement to reconvey it, at the expiration of a specified time, in payment of a sum of money, nearly equal to the consideration of the debt, but less than the value of the premises.

together with a sum for the use of the premises.—*Graham v. Stevens*, 34 Vt. 166, 80 Am. Dec. 675.

**ACTION FOR DEBT:** But one action can lie for the recovery of any debt secured by a lien upon real or personal property in this state, and where

such action is barred by the statute of limitations as to the debt, the lien is carried with it, and is likewise barred; and, whatever will prevent the running of the statute upon one will prevent it upon both.—*Law v. Spence* (Idaho), 48 Pac. 282.

**Section 2801. Mortgage, How Created:** A mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant or conveyance of real property.

1887 R. S. Sec. 3351.

Grant or conveyance of real property: Sec. 2399.

**CHATTEL MORTGAGE, VERBAL RENEWAL, CONVERSION:** The plaintiff gave to defendant a chattel mortgage to secure an indebtedness of some \$341. Subsequently plaintiff and his copartner being indebted to defendant, they jointly executed to the defendant a chattel mortgage upon property belonging to the firm for the sum of \$1,215, in which was included the amount of the said first mortgage of \$341. The mortgage for \$1,215 was subsequently paid in full. By an agreement between the plaintiff and defendant, the latter was, however, to hold said first mortgage as security for an individual indebtedness existing and to arise from future advances to be made by defendant to plaintiff. Such agreement is contrary to the provisions of this section.—*Willows v. Rosenstein* (Idaho), 48 Pac. 1067. A clerical mistake in the description of

land intended to be mortgaged by a married woman may be corrected upon a proper showing.—*Christensen v. Hollingsworth* (Idaho), 53 Pac. 211.

**MORTGAGE, HOW CREATED** No particular words are necessary to create a mortgage. The words "We mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, is clearly sufficient.—*De Leon v. Higuera*, 15 Cal. 483. The courts are so strongly inclined to construe the agreements of parties to make them effectual, that no formal words of transfer are required to make an agreement operate as a mortgage.—*Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822, 33 N. W. 117.

**MORTGAGE, RENEWAL:** A mortgage barred by the statute of limitations is not renewed by a renewal of the note secured.—*Wells v. Harter*, 56 Cal. 342.

**Section 2802. Mortgage Lien is Special:** The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.

1887 R. S. Sec. 3352.

It is the settled law in California that a mortgage of real property does not pass the title to the mortgagee, and no right of possession is conferred by it when not authorized by express terms.—*People's Savings Bank v. Jones*, 114 Cal. 422, 46 Pac. 278, citing *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4. *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Locke v. Moulton*, 96 Cal. 21, 30 Pac.

957. Nor does possession under the mortgage affect the nature of the mortgagee's interest: it does not change the relation of debtor and creditor, nor impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously.—*Johnson v. Sherman*, 15 Cal. 287; *Dutton v. Warschauer*, 21 Cal. 609; *Kidd v. Teeple*, 22 Cal. 255.

**Section 2803. Transfer When Deemed a Mortgage:** Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by an actual change of possession, in which case it is to be deemed a pledge.

1887 R. S. Sec. 3353.

**MORTGAGE, WHAT CONSTITUTES, DEED ABSOLUTE ON FACE:** A deed absolute on its face,

and a separate agreement by the grantee for the reconveyance of the same tract of land to grantor, upon payment of consideration named in the



deed, with interest, taxes, etc., by specified time, bearing the same date as deed, constitute together a mortgage.—*Kelley v. Leachman* (Idaho), 29 Pac. 849. And in such a case, ejectment will not lie by grantee to obtain possession of land from grantor. The remedy is foreclosure under section 4529, Rev. St. Idaho.—*Kelley v. Leachman*, supra.

A deed or bill of sale of either real or personal property, accompanied by a contemporaneous agreement, written or verbal, for a reconveyance of the same upon payment of consideration, which shows that the conveyance was made to secure indebtedness, is in effect a mortgage.—*Pritchard v. Butler* (Idaho), 43 Pac. 73.

Defendants executed and delivered a deed for certain real property to plaintiff. At the same time, plaintiff executed a contract to defendants by the terms of which plaintiff agreed to redeed to defendants the said lands, upon the payment to him of the sum of \$800, with interest, within one year, etc.; defendants giving to plaintiff a promissory note for that amount. Held, that the deed and contract constituted a mortgage.—*Wilson v. Thompson* (Idaho), 43 Pac. 557.

A trust deed executed to secure a given debt, payable at a specified time, upon real estate, is, under the statutes of Idaho, a mortgage, and can not be foreclosed by notice and sale, under a power of sale in such trust deed; and such trust deed can only be foreclosed by judicial sale, pursuant to decree rendered in an action brought therefor in the proper court.—*Brown v. Bryan* (Idaho), 51 Pac. 995; *Bank v. Williams*, 2 Idaho, 618, 23 Pac. 552; *Kelley v. Leachman*, 2 Idaho, 1112, 29 Pac. 849, and cases there cited; *Wilson v. Thompson* (Idaho), 43 Pac. 557, cited and followed; *Hawkins v. Mining Co.* 2 Idaho, 970, 28 Pac. 433; also cited and approved.

Under the Civil Code, Sec. 2924, (2803 of this Code) providing that every transfer of an interest in property other than in trust as security is to be deemed a mortgage, and assignment of a lease of land as security for the payment of debt is a mortgage.—*Commercial Bank v. Pritchard* (Cal.), 59 Pac.

130. An instrument in form an absolute conveyance of real estate, given to secure the payment of a debt, is no more than an equitable mortgage, and nothing short of a new agreement can convert it into a deed or transfer of title.—*Le Comte v. Pennock* (Kan.), 59 Pac. 641. See also *Hodgkins v. Wright* (Cal.), 60 Pac. 431; *Balduff v. Griswold* (Okl.), 60 Pac. 223; *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 38 L. R. A. 562, 42 N. E. 248.

**DEED, CONSTRUCTION, WHEN NOT A MORTGAGE:** Where A. gives B. a deed absolute, on its face, the fact that on the same day B. gives A. a bond agreeing to reconvey the property upon payment within certain time of the consideration named in the deed, will not render such deed a mortgage, the bond being a mere option to repurchase and not a defeasance.—*Winters v. Swift*, 2 Idaho, 60, 3 Pac. 15.

The V. M. & M. Co. holding a chattel mortgage upon certain personal property of the firm of F. E. & Son, and also a mortgage upon real property of the firm, both of which were given to secure indebtedness due and owing from said F. E. & Son to said V. M. & M. Co. on default foreclosed the chattel mortgage, F. E. & Son giving a deed to V. M. & M. Co. of the real estate; and thereupon the V. M. & M. Co. executed to said firm of F. E. & Son, an agreement, in writing, conditioned, that said V. M. & M. Co. would convey to said F. E. & Son, or either of them, the said personal property, consisting of a saw mill and belongings, and said real estate, if said firm, or either of them would pay to said V. M. & M. Co. the amount due said company from said firm at any time within a period of eight months. Held, such an agreement did not constitute the deed a mortgage.—*Felland v. Vollmer Milling & Mercantile Co. et al.* (Idaho), 53 Pac. 268. See *Woodward v. Hennegan* (Cal.), 60 Pac. 769, a case where the transaction was held not a mortgage as defendant had no title to convey and made no attempt to convey, also *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, where the transaction was held to be a pledge.

**Section 2804. Transfer Subject to Defeasance, Fact May be Proved:** The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.

1887 R. S. Sec. 3254.

CONTRACT CONSTRUED AS A

MORTGAGE, WHEN: A defeasance executed at the same time with an ab-

solute conveyance, makes in law one instrument, which will generally be considered a mortgage.—*Edrington v. Harper* (Ky.), 20 Am. Dec. 145. The onus of proving that by the execution of a defeasance simultaneously with an absolute conveyance, the parties intended the transaction to be a conditional sale lies upon the party main-

taining that such was the intention.—*Id.* A deed with condition of defeasance upon the back is but a security for money, and therefore only a mortgage; and whether the conditions preceded or followed the signature does not affect its nature.—*Perkins' Lessee v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97.

**Section 2805. Mortgage, on What a Lien:** A mortgage is a lien upon everything that would pass by a grant or conveyance of the property.

1887 R. S. Sec. 3355.

**MORTGAGE LIEN:** Under the law of Idaho a mortgage lien can not be defeated by a declaration of homestead made after the mortgage lien attaches.—*Law v. Spence* (Idaho), 48 Pac. 282.

When the grantor of mortgagor buys in and takes assignment of a mortgage upon the premises conveyed, the mortgage so purchased does not merge, except in the case where the grantee has assumed payment of the mortgage as part of consideration for the conveyance of the fee, or has manifested or declared an intention to have it merge.—*Westheimer et al. v. Thompson et al.* (Idaho), 32 Pac. 205.

**MORTGAGE LIEN, WHAT COVERS:** Plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, passed to the mortgagee by accession.—*Bryant v. Pennell*, 61 Me. 108, 14 Am. Rep. 550. A mortgagee of land out of possession may maintain an action for conversion against one who buys from the mortgagor wood and timber which the latter has wrongfully cut from the premises. —

*Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425. A contingent remainder may be charged with a deed of trust under the statute authorizing "any interest or claim to real estate" to be disposed of by deed or will.—*Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642 and note. A mortgagor of a franchise to construct, own, maintain and operate a particular water plant already in process of construction, carries with it the water plant.—*Andrews v. National Foundry & Pipe Works*, 46 U. S. App. 281-619, 36 L. R. A. 139, rehearing 153.

**WHAT IS NOT INCLUDED IN LIEN:** Growing crops are not a part of realty so as to be included in a mortgage.—*Simpson v. Ferguson*, 112 Cal. 180, 44 Pac. 484; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. Logs cut upon mortgaged premises within one year after foreclosure by the mortgagor in possession who has a right to redeem within that time, can not be recovered in an action of claim and delivery or replevin by the purchaser at the foreclosure sale.—*Berthold v. Holman*, 12 Minn. 335, 93 Am. Dec. 234.

**Section 2806. Subsequently Acquired Title Inures to Mortgagee:** Title acquired by the mortgagor subsequently to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution.

1887 R. S. Sec. 3356.

**AFTER-ACQUIRED TITLE:** Where the description in a mortgage is plain and unambiguous, and according to the recorded plat, subsequently acquired title sufficient to meet the description will inure to the benefit of the mortgagee.—*Osborne v. Scottish-American Mortgage Co.* (Wash.), 60 Pac. 49. Where a mortgage of land purports to convey the fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee; and this is so, although the title, when the mortgage was made, was in the government of the United States, but was

acquired by the mortgagor after the foreclosure of the mortgage.—*Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Sherman v. McCarthy*, 57 Cal. 507; *Vallejo Land Ass'n. v. Viera*, 48 Cal. 572. A mortgage by a legatee of all her interest in the estate of the testator, executed after distribution, but referring to the administration files and records for a more completed description of the mortgagor's interest, authorized the court to decree a sale of land which afterwards vested absolutely in the mortgagor by reason of deeds of release from other legatee's interest therein.—*Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

**Section 2807. Power of Attorney to Execute:** A power of attorney to execute a mortgage must be in writing, subscribed, ac-



knowledge, or proved, certified and recorded in like manner as powers of attorney for grants of real property.

1887 R. S. Sec. 3357.

Power of attorney respecting real property: Sec. 2405.

**Section 2808. Assignment of Mortgage May be Recorded:** An assignment of a mortgage may be recorded in like manner with a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

1887 R. S. Sec. 3358.

The assignees of several notes secured by mortgage or vendor's lien, share pro rata, if there is nothing in the contract of assignment or in the intention of the parties to vary the

rule.—Nashville Trust Co. v. Smythe, 94 Tenn. 513, 27 L. R. A. 663, 29 S. W. 903. Unrecorded assignments, see Purdy v. Huntington, 42 N. Y. 334, 1 Am. Rep. 532.

**Section 2809. Record of Assignment not Notice to Whom:** The record of the assignment of a mortgage is not of itself notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee.

1887 R. S. Sec. 3359.

Notice of assignment of a mortgage should be given to the mortgagor or payment made by him to the mortgagee must be allowed, but no notice need be given to subsequent assignees. —James v. Morey, 2 Cow. 246, 14 Am. Dec. 475. Independent of the debt it is

given to secure, a mortgage has no assignable quality, and one who receives an assignment of a mortgage without an assignment of the debt for which it was given, takes nothing by the assignment. —Polhemus v. Trainer, 39 Cal. 686.

**Section 2810. Assignment of Debt Carries Security:** The assignment of a debt secured by mortgage carries with it the security.

1887 R. S. Sec. 3360.

**MORTGAGE IS INCIDENT TO THE DEBT:** Mortgage given to secure the payment of a note is a mere incident to the note, and its foreclosure is not barred so long as an action upon the note is not barred.—Moulton v. Williams (Idaho), 55 Pac. 1019. Where several notes have been given which are secured by one mortgage, and the notes are assigned to different persons, the assignor has a right, by agreement with the assignees, to fix the rights of the purchaser of the several notes and the mortgage security. —Grattan v. Wiggins, 23 Cal. 16. An agreement for preference in the security given to the assignee of a part of a series of negotiable notes secured by mortgage or vendor's lien, is valid as against subsequent assignees of other notes in the series.—Nashville Trust Co. v. Smythe, 94 Tenn. 513, 27 L. R. A. 663, 29 S. W. 903. Assignees of several notes secured by mortgage or vendor's lien share pro rata, if there is nothing in the contract of assignment, or in the

intention of the parties to vary the rule.—Id. Bona fide holders of promissory notes secured by mortgage or vendor's lien may hold a security as well as the notes unaffected by equities between prior holders and the mortgagor.—Id. The transfer of a note secured by mortgage carries with it the mortgage also, and when the original mortgagee and payee sells such note without assigning the mortgage to the purchaser of the same, and the defendant takes subsequent mortgages upon the same property, and fraudulently discharges the prior mortgage, he can gain no advantage thereby, either for himself or for one for whom he is acting as agent, in any of the transactions directly involving the property mortgaged.—Parker v. Randolph, 5 S. D. 549, 29 L. R. A. 33, 59 N. W. 722; Kernohan v. Manss, 53 Ohio St. 118, 41 N. E. 258, 29 L. R. A. 317. A mortgage being a mere incident to a debt, belongs to the holder of the collateral note and can be enforced only by him.—Adler v. Newell, 109 Cal. 42, 41 Pac. 799.

**Section 2811. Mortgage, How Discharged:** A recorded mortgage or chattel mortgage filed as provided by law, may be dis-

charged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows:

"Signed and acknowledged before me this.....day of.....  
in the year of.....

A. B., Recorder.

1887 R. S. Sec. 3361, amended 1899,  
5th Ses. p. 249.

**EFFECT OF DISCHARGE:** The entering of a discharge of the mortgage by the mortgagee, does not, of itself, discharge the debt, but only the security.—*Sherwood v. Dunbar*, 6 Cal. 53. *Thomas v. Linn*, 40 W. Va. 135, 20 S. E. 878. A written power authorizing an attorney in fact to satisfy a mortgage, and to make, execute and deliver

all and any instruments in writing necessary therefor, does not authorize the attorney to enter satisfaction of a mortgage given to his principal until the debt secured by it is paid.—*Hutchings v. Clark*, 64 Cal. 228, 30 Pac. 805. Effect of forging upon the original mortgage and entry of satisfaction.—*Luther v. Clay*, 100 Ga. 236, 39 L. R. A. 95, 28 S. E. 46; *Parker v. Randolph*, 5 S. D. 549, 29 L. R. A. 33, 59 N. W. 722.

### **Section 2812. Discharge of Mortgage by Recorder:**

A recorded mortgage or chattel mortgage filed as provided by law, if not discharged as provided in the preceding Section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representative or assigns, acknowledged or proved and certified as prescribed by the Chapter on "Recording Transfers" stating that the mortgage has been paid, satisfied or discharged.

1887 R. S. Sec. 3362, amended 1899,  
5th Ses. p. 249.

Recording transfers: Chap. C.

**Section 2813. Certificate of Discharge Must be Recorded:** A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof must be recorded at length, and a reference made in the record to the book and page where the mortgage is recorded and in the minutes of the discharge made upon the record of the mortgage to the book and page where the discharge is recorded.

1887 R. S. Sec. 3363; 1875 Comp. Laws, p. 603, Sec. 39.

**Section 2814. Duty of Mortgagee on Discharge of Mortgage:** When any mortgage has been satisfied, the mortgagee or his assignee must immediately, on the demand of the mortgagor, execute, acknowledge, and deliver to him a certificate of the discharge thereof, so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage to be entered of record; and any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge, and deliver to the mortgagor the certificate of discharge or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this Chapter, is liable to the mortgagor or his grantee or heirs, for all damages for which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars.

1887 R. S. Sec. 3364; 1875 Comp.  
Laws p. 603, Sec. 40.

Under the provisions of this section  
a cause of action does not accrue until



the mortgage debt is paid in full, and a discharge of the mortgage demanded. — *Barnes v. Pitts Agricultural Works* (Idaho), 55 Pac. 237. In an action under the provisions of this section to compel the discharge of a mortgage, and to recover damages and penalty, the complaint must contain a direct and unequivocal allegation of payment of the amount secured by such mortgage. — *Gamble v. Canadian & American Mortgage & Trust Co. Limited* (Idaho), 55 Pac. 241. Where a mortgagor sues to recover a statutory penalty for the failure of the mortgagee to discharge the mortgage of record after its satisfaction, the mort-

gagee should set up any rights under the mortgage by way of counter claim. — *Stevens et al. v. Home Savings & Loan Ass'n.* (Idaho), 51 Pac. 986. (On rehearing—rehearing denied.) In a suit brought by a mortgagor to recover the statutory penalty for failing to discharge of record of mortgage which has been fully satisfied, the parties, or either of them, have an absolute right to a trial by jury.—*Stevens et al. v. Home Savings & Loan Ass'n. of Minneapolis, Minn.* (Idaho), 51 Pac. 773. (For opinion on rehearing see 51 Pac. 986.) *Cleveland et ux v. Western Loan & Trust Co.* 63 Pac. 112.

#### MORTGAGES OF REAL PROPERTY.

### **Section 2815. What Interest May be Mortgaged:**

Any interest in real property which is capable of being transferred may be mortgaged.

1887 R. S. Sec. 3375.

What capable of being transferred.—*Baylor v. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551; *Trull v. Eastman*, 3 Met. 121, 37 Am. Dec. 126; *Purcell's Adm'r. v. Mather*, 35 Ala. 570, 76 Am.

Dec. 307; *Whitney v. Buckman*, 13 Cal. 563; *Kirkaldie v. Larrabee*, 31 Cal. 455; *Stewart v. Powers*, 98 Cal. 514, 33 Pac. 486; *Norris v. Heald*, 12 Mont. 282, 53 Am. St. Rep. 581, 29 Pac. 1121.

### **Section 2816. Absolute Grant, Intended to be De-**

**feasible:** When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, is recorded in the office of the county recorder of the county where the property is situated.

1887 R. S. Sec. 3376.

Deed absolute on its face when a mortgage: Sec. 2803 and note.

**PURCHASE OF LAND WITHOUT NOTICE OF MORTGAGE:** If land is conveyed by a deed absolute in form as security for the payment of money loaned, a purchaser from the grantee without notice that the grant was intended as a mortgage, acquires a title free from the equity of the grantor.—*Pico v. Gallardo*, 52 Cal. 206. When property is mortgaged by an unrecorded deed, absolute upon its face, accom-

panied by a separate defeasance, possession and actual occupation by the mortgagor is notice of his title to a purchaser from the mortgagee.—*Daubenspeck v. Platt*, 22 Cal. 330. In *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356, it is held that the fact that a tenant of the prior grantee of the land was in the possession thereof is not, ipso facto, actual notice to a subsequent purchaser or mortgagee of the former grantee's equities, but is only evidence tending to prove notice.

### **Section 2817. Mortgage, How Acknowledged and**

**Recorded:** Mortgages of real property may be acknowledged, or proved, certified and recorded in like manner and with like effect as grants and conveyances thereof.

1887 R. S. Sec. 3377.

Acknowledgments: Chap. XCIX.

Recording transfers: Chap. C.

A definitely acknowledged mortgage,

though recorded, will not impart constructive notice to subsequent purchasers and creditors.—*Rold v. Kleyensteuber* (Ariz.), 60 Pac. 879.

## CHATTEL MORTGAGES.

**Section 2818. What Property May be Mortgaged:**

Chattel mortgages may be made upon all property, goods or chattels, not defined by statute to be real estate, upon growing crops, and upon crops to be sown and grown in the future; but, should the persons executing mortgages upon crops, to be afterwards sown, fail to sow or cause the same to be sown, no lien of such mortgages shall attach to crops sown by other persons upon the lands described in said mortgages, except in so far as the mortgagors in said mortgages have or retain interests in said crops.

1887 R. S. Sec. 3385, amended 1899, 5th Ses. p. 292; 1897, 4th Ses. p. 7.

**VALID MORTGAGES:** A mortgage of after-acquired property is good and valid; and the lien of the mortgage attaches so long as the property is acquired by the mortgagor.—*Akers v. Rowan*, 33 S. C. 451, 10 L. R. A. 705, 12 S. E. 165. Claims for money not yet earned may be the subject of a valid chattel mortgage.—*Sandwich Manufacturing Co. v. Robinson*, 83 Iowa, 567, 49 N. W. 1031, 14 L. R. A. 126 and note. The sale or mortgage of future crops is discussed fully in note to *Dickey v. Waldo*, a Michigan case, reported in 23 L. R. A. page 449, 56 N. W. 608. And the subject of mortgage of after-acquired property and of property having only a potential existence is discussed in note to *Moody v. Wright*, reported in 46 Am. Dec. 706 and note 712.

**INVALID MORTGAGES:** A mortgage executed in 1888 upon crops to be raised during the years 1889, 1890 and 1891, conveys no title to such crops, either legal or equitable, which can be enforced by an action of claim and delivery.—*Loftin v. Hines*, 107 N. C. 360, 10 L. R. A. 490, 12 S. E. 197. A mortgage on threshing machine accounts not yet earned, is void as to them for lack of definite description, where they are described only as all such accounts which shall be earned up to the time the mortgaged debt is fully paid by a threshing machine which is also included in the mortgage. *Beck, C. J.* dissenting.—*Sandwich Manufacturing Co. v. Robinson*, 83 Iowa, 567, 14 L. R. A. 126, 49 N. W. 1031.

**CHATTEL MORTGAGE ON CROPS:** A crop mortgage which describes the grain as "the crop of wheat

and flax now being, standing and growing, or all the wheat and flax now growing upon the land," known as the "timber claim" of the mortgagor in Nez Perce county, Idaho, held, good. The description of "all wheat and flax to be sown and grown upon the land," described without specifying the year in which it is to be sown and grown, held, insufficient.—*McConnell v. Langdon*, 2 Idaho, 892, 28 Pac. 403. D. leased to G. certain lands, D. executing a chattel mortgage on the crop of wheat that may be sown and grown in the year 1890 upon said lands. Mortgage duly recorded March 29, 1890. March 1, 1890, D. sublets to P. the land aforesaid. In an action by P. to recover from defendant who, as sheriff, had seized and sold 590 sacks of wheat of the crop of 1890 under foreclosure of said mortgage. Held, said mortgage was a valid lien and rights acquired thereto from D. subsequent to the recording of the mortgage subject thereto.—*Pierce v. Langdon*, 2 Idaho, 878, 28 Pac. 401.

**FORECLOSURE OF CHATTEL MORTGAGE, FUTURE ADVANTAGES:** K., desirous of starting a newspaper in Boise, requested a loan, to be repaid in one year, with interest. A subscription was raised and \$5,500 subscribed. A mortgage was executed to secure the repayment of the same. But \$3,050 of said sum was paid by the subscribers. Held, under the evidence, that said mortgage was given to secure future advances, with full knowledge on the part of the mortgagor that the loan to him of said entire sum of \$5,500 was contingent upon the collection of the same from said subscribers.—*O'Farrall v. Kennedy*, 49 Pac. 313.

**Section 2819. Exempt Property of Husband or Wife, how Mortgaged:**

No personal property of either husband or wife, that is exempt by law from execution, shall be mortgaged by either husband or wife without the joint concurrence of both.

1899, 5th Ses. p. 292; 1897, 4th Ses. p. 7.

**Section 2820. When Void as Against Creditors, etc.:**

A mortgage of personal property is void as against creditors of the



mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:

First. It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

Second. It is acknowledged or proven, as grants of real estate, and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept.

1887 R. S. Sec. 3386, amended 1899, 5th Ses. p. 121; 1891, 1st Ses. p. 181.

**POSSESSION BY MORTGAGOR, RIGHTS OF ATTACHING CREDITORS:** This section provides that where the mortgagor retains possession of the mortgaged chattels, the recording of the mortgage shall protect the mortgagee against attaching creditors. Held, that in the absence of further statutory enactments, a chattel mortgage providing that the mortgagor shall continue in possession, doing a retail business, is invalid as against attaching creditors, in the absence of the provision that the proceeds of the business shall be applied on the mortgagee's debt.—*Lewiston National Bank v. Martin*, 2 Idaho, 700, 23 Pac. 920. A chattel mortgage upon a stock of merchandise, under the terms of which the mortgagor retains possession, and sells in the usual course of trade, applying proceeds of sale, less expenses thereof, to the mortgage debt, is valid as between the parties and privies thereto, and as against junior mortgages of the same kind, taken with actual notice of such former mortgage.—*Wells, Fargo Co. et al. v. Alturas Commercial Co. et al.* (Idaho), 56 Pac. 165. A junior mortgagee, who takes his mortgage with the actual notice of the existence of another mortgage upon the same property, and with the understanding that the lien of his mortgage is subject to that of such former mortgage, is not entitled to precedence on the ground that such former mortgage was not filed of record in the proper county recorder's office prior to the time that his mortgage was filed in such office.—*Wells, Fargo & Co. et al. v. Alturas Commercial Co. et al.* (Idaho), 56 Pac. 165. A subsequent purchaser in good faith of mortgaged property must acquire the chattels for a valuable consideration, without actual knowledge of the existence of the mortgage. "Actual notice" as applied to conveyances, does not necessarily mean actual knowledge: it may be implied. If the party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiry, and he evade inquiry, he

is chargeable with notice of the facts which by ordinary diligence he could have ascertained.—*Schnavely v. Bishop* (Kan.), 55 Pac. 667. A mortgagee of personal property, to whom delivery of personal property has been made, can maintain claim and delivery for the wrongful taking thereof by a third party.—*O'Neil v. Whitcomb et al.* (Idaho), 32 Pac. 1133.

**CHATTEL MORTGAGE, RECORD, NOTICE, RELEASE:** On October 1, 1889, R. leased by written indenture to D. certain lands situated in Latah county, Idaho, for the year 1890, at a rental of one-third of the crop grown, term to commence October 1, 1889. The lease contained a provision reserving to the lessor the right to seed said ground, providing said second party, lessee, fails to do so in good season. No provision of forfeiture or right of re-entry in lease. D. entered under lease and continued in possession, working and operating the ranch to the end of the term. On the 28th of January, 1890, D. executed a chattel mortgage on said crop to S., which mortgage was duly recorded. On the 24th of March, 1890, D. executed to R., lessor, a release of the lease. There was no change in the possession, operation or management of the farm after the execution of the release. Crop was divided as provided for in lease. Held, that the record of the chattel mortgage was notice to all acquiring an interest from D. in the crop subsequently to the recording thereof; that R. took release subject to rights of S. under the mortgage. Held, further, under the evidence in this case, that the release from D. to R. was made and intended as a fraud upon S., the holder of the mortgage.—*Shields v. Ruddy*, 2 Idaho, 884, 28 Pac. 405. A chattel mortgage, though unrecorded, takes precedence over a subsequent attachment based upon a debt existing prior to the execution of the mortgage under a statute declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers in good faith and for value, unless the original or an authenticated copy thereof be filed in the

office of the register of deeds. A creditor within the meaning of this statute, is one who becomes such after the

mortgage was executed.—Union Nat'l Bank v. Oium, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034.

**Section 2821. Duty of Recorder. Form of Book. When Need Not be Filed:** Upon the receipt of any such instrument, the recorder shall indorse on the back the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested, and the recorder shall keep a book in which shall be entered a minute of all mortgages of personal property; such book shall be ruled off into separate columns, with heads as follows: "Time of reception," "Name of mortgagor," "Date of instrument," "Amount secured," "When due," "Property mortgaged," "Before whom sworn to and acknowledged," and "Remarks."

The proper entry shall be made under each of such heads, and the recorder shall receive the sum of fifty cents and no more, for filing any such mortgage, which amount he may demand before filing any such mortgage: *Provided*, That property in transit from the possession of the "mortgagee" to the county in which the "mortgagor" resides, or to a location for use shall, for a reasonable length of time for such transportation, be considered as located in the county to which the same is being removed: *Provided, further*, That if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the filing of his mortgage during the continuance of such actual possession.

1887 R. S. Sec. 3387, amended 1899, 5th Ses. p. 121; 1891, 1st Ses. p. 181.

When a chattel mortgage is executed in good faith in favor of a bona fide creditor, his assent thereto will be pre-

sumed from the time of its registration, although it was executed and recorded without his knowledge.—First Nat'l. Bank v. Ridenour, 46 Kan. 718, 26 Am. St. Rep. 167, 27 Pac. 150.

**Section 2822. Removal of Property from County, Effect:** When mortgaged personal property is thereafter removed from the county wherein it was situated at the time of the execution of the mortgage by the written consent of the mortgagee, it is, except as between the parties to the mortgage, exempt from the operations thereof, unless, either, first, the mortgagee within ten days after such removal cause the mortgage to be filed in the county to which the property has been removed, or second, the mortgagee within ten days after such removal take possession of the mortgaged property.

1887 R. S. Sec. 3388; 1885, 13th Ses. p. 74.

Extraterritorial force of chattel mortgage record: Ord Nat'l. Bank v.

Massey (Kan.), 30 Pac. 124, 17 L. R. A. 127 and note; Handley v. Harris, 48 Kan. 606, 30 Am. St. Rep. 322, 29 Pac. 1145.

**Section 2823. Mortgaged Property may be Attached how:** All mortgaged personal property may be attached at the suit of any creditor of the mortgagor; such creditor, however, must pay or tender to the mortgagee, the amount due him on such mortgage before the officer making such attachment is entitled to the actual possession of such property. When the property thus attached and redeemed by the creditor is sold by the officer under due legal proceedings, he must:



First. Pay to such creditor the amount advanced by him to pay the mortgage with lawful interest thereon;

Second. Pay all costs appertaining to the judgment, execution and sale;

Third. Pay the judgment creditor the amount of his judgment, and the surplus, if any, to the judgment debtor; if the creditor of the mortgagor prefer he may cause to be attached the equity of redemption of the mortgagor; such attachment is made by serving upon the mortgagor and the mortgagee a copy of the writ of attachment, together with a notice signed by the officer that the interest of the mortgagor in such property is attached when the sale of such equity is made on execution obtained by such attaching creditor, the proceeds must be applied to the payment of the costs and the satisfaction of the judgment, and the remainder, if any, paid to the judgment debtor. The purchaser at such sale is entitled to the possession of the property, subject, however, to the rights of the mortgagee.

1887 R. S. Sec. 3389; 1885, 13th Sess. p. 75.

**CHATTEL MORTGAGES:** When a creditor seeks to subject the property of his debtor to the payment of his claim, upon which property there exists a chattel mortgage, and the creditor, to avail himself of the remedy provided by this section, pays to the mortgagee the amount of such mortgage, such payment by the creditor discharges the mortgage and the lien thereunder, and the creditor can not thereafter enforce the mortgage lien.

—Baumgartner v. Vollmer (Idaho), 49 Pac. 729.

**ATTACHMENT, ATTACKING VALIDITY OF CHATTEL MORTGAGE:** A creditor has the right to attack the validity of a chattel mortgage by attaching property described therein, giving indemnifying bond to sheriff, and selling the property. The sheriff and creditor do this, however, at the peril of being obliged to pay all damages to the mortgagee, if the mortgage is held good.—McConnell v. Langdon, 2 Idaho, 892, 28 Pac. 403.

**Section 2824. Mortgage, how Foreclosed:** Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as hereinafter provided, or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated.

1887 R. S. Sec. 3390; 1885, 13th Sess. p. 75.

Affidavit and notice for the foreclosure of a chattel mortgage, under this and subsequent sections, are held to be process, and as such will protect the sheriff in the execution thereof, the same as he is protected in the service of an ordinary execution in case of judgment. Upon the receipt of such process, the sheriff must proceed to execute the same, and having levied upon the goods described therein, he must proceed to give notice and sell the same, as provided in the statute, notwithstanding an attachment, or execution of a judgment creditor may be placed in his hands after the said affidavit was levied upon the goods.

The sheriff is not called upon to determine whether the mortgage upon which the affidavit and notice were issued is a valid mortgage or not.—Blumauer-Frank Drug Co. v. Branstetter, Idaho, 43 Pac. 575.

**FORECLOSURE OF CHATTEL MORTGAGE, ACTION FOR DEFICIENCY:** The plaintiff held a chattel mortgage given by defendant to secure the payment of three promissory notes for purchase price of certain personal property. Default having been made by defendant in the conditions of mortgage, plaintiff foreclosed by notice and sale, as provided by statute. The return of the sheriff showed a deficiency of some \$900, to recover which amount plaintiff brings this action. To a complaint setting forth all the details of the transaction, including the foreclosure, sale and return of the sheriff, showing deficiency in proper form, the defendant enters general demurrer, which is sustained by the court. Held, that the action was properly brought and that the action of the district court in sustaining the demurrer to the complaint was error.—Advance Thresher Co. v. Whiteside, 2 Idaho, 806, 26 Pac. 660. A mortgage

given to secure the payment of a note is a mere incident to the note, and its foreclosure is not barred so long as an action upon the note is not barred.—Moulton v. Williams (Idaho), 55 Pac. 1019; Rein v. Callaway, 65 Pac. 63.

**Section 2825. Foreclosure by Notice and Sale, Affidavit:** In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit must be placed in the hands of the sheriff, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same.

1887 R. S. Sec. 3391; 1885 13th Ses. p. 75.

**Section 2826. Affidavit, how and on Whom Served:** The affidavit must be personally served upon the mortgagor, or other person having possession of the mortgaged property, in the same manner as is provided by law for the service of a summons. At the time of such service of the affidavit, the officer must also serve a notice signed by himself, setting forth a full description of the property, the amount claimed to be due by the mortgagee, and the time and place of sale; *Provided, however,* That if the mortgagor or other person interested, cannot be found within the county wherein the mortgage is being foreclosed, and has no agent therein known to the officer, the general notice of sale directed in the next Section is sufficient service upon all parties interested.

1887 R. S. Sec. 3392; 1885, 13th Ses. p. 75.

**Section 2827. Notice of Sale, how Given:** The officer must take the property into his possession and give notice of sale in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale must be conducted in the same manner.

1887 R. S. Sec. 3393; 1885, 13th Ses. p. 76.

**Section 2828. What Purchaser Takes. Bill of Sale:** The purchaser at such sale takes all the interest which the mortgagor had in the mortgaged property at the time of the execution of the mortgage, and the officer selling must execute to him a bill of sale of the property, which must set forth the date of the mortgage, the names of the parties thereto, the date of sale, a description of the property, and the amount paid therefor.

1887 R. S. Sec. 3394; 1885, 13th Ses. p. 76.

**Section 2829. Return of Officer:** The officer must make return upon the affidavit hereinbefore mentioned of all his proceedings, and must transmit the same by mail or otherwise, to the clerk of the district court having jurisdiction in the county in which the sale was made, and the clerk must file such return in his office.

1887 R. S. Sec. 3395; 1885, 13th Ses. p. 76.

**Section 2830. Right to Foreclose may be Contested in District Court:** The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the dis-



trict court by any person interested in so doing, for which purpose an injunction may issue if necessary.

1887 R. S. Sec. 3396; 1885, 13th Ses. p. 76.

**Section 2831. Sale of Mortgaged Property Void when:** If the mortgagor of any property mortgaged in pursuance of the provisions of this Chapter, while such mortgage remains unsatisfied, in whole or in part, wilfully removes from the county or counties where the mortgage is recorded, destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without consent of the holder of said mortgage, is guilty of larceny, and such sale or transfer is void.

Section cited in *Blumauer-Frank Drug Co. v. Branstetter* (Idaho), 43 Pac. 575.

1887 R. S. Sec. 3397; 1885, 13th Ses. p. 76; 1881, 11th Ses. p. 307.

Wilfully removing, destroying or concealing mortgaged property; penalty for: Penal Code, Sec. 4970.

WILFUL SALE BY MORTGAGOR,

**ORAL CONSENT OF MORTGAGEE:** Under this section making a wilful sale of property upon which there is a chattel mortgage, without the written consent of the mortgagor void, the evidence of the oral consent of the mortgagee to the sale is admissible as explaining the intent of the mortgagor in making such sale.—*Mills v. Glennon*, 2 Idaho, 95, 6 Pac. 116.

**Section 2832. Time Allowed to File Mortgage:** The mortgagee is allowed one day for every twenty miles or fraction thereof of the distance between his residence and the county recorder's office where such mortgage is to be filed, to conform to the provisions of this Subdivision, before any subsequent incumbrance, sale or seizure, under any process, is effectual to hold or bind the mortgaged property.

1887 R. S. Sec. 3398; 1885, 13th Ses. p. 77.

#### PLEDGE.

**Section 2833. When Contract Deemed a Pledge:** Every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge.

1887 R. S. Sec. 3410.

**CONTRACTS OF PLEDGE:** A pledge is a bailment of goods by a debtor to his creditor to be kept by him until his debt is discharged.—*First National Bank v. Harkness*, 42 W. Va. 156, 32 L. R. A. 408, 24 S. E. 548; *Jackson v. Kincaid*, 4 Okl. 554, 46 Pac. 587. The pledge of personal property passes to the pledgee merely the possession with a right of retainer until the debt or other acknowledgment is fulfilled for which the article pledged is given as security.—*Lucketts v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723. An exhaustive note on this subject may be found on page 730. The assignment of an insurance policy on mortgaged premises as further security for the debt, is a pledge within that section of the Civil Code which provides that "Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge."—*Savings Bank v. Middlekauff*,

113 Cal. 463, 45 Pac. 840. A transfer of personal property to trustees as security for a debt, under an agreement that said trustees are to conduct the business of the creditors through one of the latter as their agent for six months, when, if found unprofitable, they are to sell the goods, and providing that, when certain creditors shall have received 50 per cent of their claims, and all costs and expenses, then the trust shall be terminated, and the assets remaining shall be transferred to such creditors, is a pledge; and if actual possession is not taken by the trustees, it is invalid as against the subsequent attachment of the property of a creditor of the pledgor.—*Lilienthal v. Ballou*, 125 Cal. 183, 57 Pac. 897. Personal property may be pledged, mortgaged, hypothecated or placed in trust upon such terms and conditions as parties may agree, and courts of law will be governed by the language of the contract in each par-

ticular case.—*Hyatt v. Argenti*, 3 Cal. 151.

**CARE REQUIRED:** A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence.—*St. Losky v. Davidson*, 6 Cal. 643; *Damon v. Waldteufel*, 99 Cal. 234, 33 Pac. 903. Under this section of the Civil Code, one having the possession of personal property as security for the debt due him, holds the same as a pledgee, whether the title thereto has passed to him or not.—*Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773. The pledgee of corporate stock, the contract of pledge be-

ing silent on the subject, has not the right by virtue of the pledge before the maturity of the deed to have the stock transferred on the books into his name.—*Spreckles v. Nevada Bank*, 113 Cal. 272, 45 Pac. 329.

**NEGLIGENCE OF PLEDGEE, LIABILITY:** Where a party takes any property as a pledge for the security of a debt, which passes through his gross of a debt, which through his gross neglect is lost, he must bear the loss, and he must exercise ordinary care and diligence in all cases. Where there is no contract as to the disposition to be made of the pledge, and the pledgor claims it is lost by neglect, he must show the neglect, and that damage resulted to him therefrom.—*Murphy v. Bartsch*, 2 Idaho, 603, 23 Pac. 82.

**Section 2834. Delivery and Possession Essential to Validity of Pledge:** The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge holder, as hereafter prescribed.

1887 R. S. Sec. 3411.

**VALIDITY AS AGAINST CREDITORS:** In order to constitute a valid pledge there must be an immediate, actual and continuous change of possession of the property pledged, as against creditors or subsequent purchasers and incumbrancers in good faith.—*Jackson v. Kincaid*, 4 Okl. 554, 46 Pac. 587. The delivery may be made to the creditor or to a third person to hold possession for the creditor, and when delivered to a third person, he must, of course, know of the trust, and accept the obligation it imposes.—*In re Succession of Lanaux*, 46 L. Ann. 1036, 25 L. R. A. 577, 15 So. 708. Bona fides does not avail a pledgee in the absence of delivery of possession, either actual or constructive.—*Geilfuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166, 70 N. W. 306. See same case as to constructive delivery.

A change of possession is not effected merely by having the former owner manage the property as the servant, agent or clerk of the pledgee; and this is especially so where there was so little outward sign of a change of ownership. Public policy requires a real and substantial compliance with the statute, and the failure should not be condoned for the hardships of a particular case.—*Lilienthal v. Ballou*, 125 Cal. 183, 57 Pac. 897. After personal property has been pledged and the possession thereof delivered to the pledge holder, the mere fact that the pledgor, either with or without the knowledge or consent of the pledgee, for a time assists the pledge holder in

taking charge of the property, does not necessarily render the holding as a pledge void as to creditors of the pledgor. In such a case, there is a sufficient delivery and continuous change of possession to preserve the lien of the pledgee.—*Hilliker v. Kuhn*, 71 Cal. 214, 16 Pac. 707. Where from its situation, personal property is not susceptible of actual delivery, manual delivery is not essential to the creation of a pledge; it may be created by a symbolical delivery, as by the delivery of a bill of parcels and a warehouse receipt.—*Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147; *First National Bank v. Harkness*, 42 W. Va. 156, 32 L. R. A. 408, 24 S. E. 548. Goods delivered to a carrier for transportation to the pledgee, under a bill of lading expressly naming him as consignee is a valid delivery of the pledge, which, in the absence of fraud, passes title, as against an attachment levied on the goods in transit.—*Toms v. Whitmore* (Wyo.), 44 Pac. 56.

**WHO MAY QUESTION VALIDITY OF TRANSFER:** The defendant, as sheriff, levied upon the property by virtue of attachment at the suit of one La Borge, against K., in September of the year following the transfer of the property. Held, that the property was not subject to levy for the debts of K. A creditor desiring to contest the validity of a sale must prove a debt or judgment, if it has been reduced to a judgment, before he can be permitted to question the validity of the transfer of property as a pledge.—*Murphy v. Braase, Sheriff* (Idaho), 32 Pac. 208.



**Section 2835. Increase of Property Pledged:** The increase of property pledged is pledged with the property.

1887 R. S. Sec. 3412.

**Section 2836. Lienor May Pledge Property:** One who has a lien upon property may pledge it to the extent of his lien.

1887 R. S. Sec. 3413.

**Section 2837. When Owner Cannot Defeat Pledge:** One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value.

1887 R. S. Sec. 3414.

**RIGHTS OF BAILOR AS TO THIRD PERSONS:** This section affords no protection to the pledgee of property received from one with whom it was left for safe keeping.—*Shafer v. Lacy*, 121 Cal. 574, 54 Pac. 72. Where one transferred and endorsed bank stock in blank, and delivered the same to his agent, with power to negotiate and pledge the same, he cannot recover for the conversion thereof by the pledgee of the agent, who took it in good faith for value, without refunding or offering to refund the amount advanced by the pledgee.—*Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 57 Pac. 84; *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960; *Arnold v. Johnson*, 66 Cal. 402, 5 Pac. 796. Where goods are deposited in a warehouse in the name of an agent, who is apparently the owner thereof, a pledge of the

goods by such agent as security for a loan is valid as against the real owner, if the pledgee acted in good faith and after notice that the pledgor was not the owner.—*Amann v. Lowell*, 66 Cal. 306, 5 Pac. 363. A pledge of the property of his principal made by a factor having its possession and control, as security for his individual debt, is good as against the principal, if the pledgee acted in the due course of business without notice of the actual ownership.—*Wisp v. Hazard*, 66 Cal. 459, 6 Pac. 91. Where goods are delivered to one merely that he may show them to a possible purchaser, one to whom he pledges them for money which he appropriates for himself has no title as against the rightful owner.—*Rumpf v. Barto*, 10 Wash. 382, 38 Pac. 1129; *Thompson v. Toland*, 48 Cal. 99.

**Section 2838. Third Person as Pledge Holder:** A pledgor and a pledgee may agree on a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledge holder.

1887 R. S. Sec. 3415.

**Section 2839. Pledge Holder Must Enforce Rights of Pledgee:** A pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them.

1887 R. S. Sec. 3416.

**ACTION BY PLEDGEE FOR CONVERSION OF PLEDGE:** The pledgee as against a stranger to the pledgor and wrong-doer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands,

and if he recovers in such action, and the wrong-doer satisfies the judgment, he thereby acquires title to the pledge.—*Thompson v. Toland*, 48 Cal. 99. See also *Barnhart v. Fulkerth*, 73 Cal. 526, 15 Pac. 89; *Hawley Brothers Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 468.

**Section 2840. Credit by Misrepresentation: Rights of Pledgee:** Where a debtor has obtained credit or an extension of time by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to

correspond with the value represented; and in default thereof may recover his debt immediately, though it be not actually due.

1887 R. S. Sec. 3417.

**Section 2841. Pledgee May Sell Pledge, When:** When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed.

1887 R. S. Sec. 3418.

**REMEDIES OF THE PLEDGEE:** A pledgee holding pledge as collateral security may after debt falls due, elect one of three remedies. 1. Proceed personally against pledgor for his debts without sale of pledge. 2. File a bill in chancery for a judicial sale under a regular decree of foreclosure. 3. Sell the pledge without judicial process upon reasonable notice to debtor to redeem.—*Robinson v. Hurley*, 11 Iowa, 410, 79 Am. Dec. 497. To the same effect is *Sonoma Valley Bank v. Hill*, 59 Cal. 107, in which the court says: "Now it is well settled that in the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt after selling the pledge, for the reason that the security is only collateral." In

*Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062, the court says: "We find nothing which would prevent a pledgee from having his action to recover the debt, without first exhausting the subject of the pledge." The common law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by Sec. 3331 of the Code of Civ. Proc.—*Mauge v. Heringhi*, 26 Cal. 577.

**TENDER AND DEMAND:** The lien of the pledgee is extinguished when a tender of the amount due on the debt is made according to law and refused by the pledgee. Upon such tender being made and refused, when, on or after such tender, a demand is made for the pledge, which is refused, the pledgee is guilty of conversion.—*Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773.

**Section 2842. Pledgee Must Demand Performance Before Sale:** Before property pledged may be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found.

1887 R. S. Sec. 3419.

**DEMAND AND NOTICE:** A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice, to a party having full knowledge of his title, no absolute title passes and the property remains in the hands of the purchaser as a

pledge.—*Dewey v. Bowman*, 8 Cal. 145; *Gay v. Moss*, 34 Cal. 125. Where the pledgee sells the absolute property in the pledge to a bona fide purchaser, the purchaser is entitled to retain the pledge until the pledgor discharges the debt for which it was pledged.—*Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595.

**Section 2843. Notice of Sale to Pledgor Must be Actual:** A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend.

1887 R. S. Sec. 3420.

**NOTICE OF SALE:** A pledgee has no right to sell until after demand and notice, and if he sells without demand and notice to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser as a pledgor.—*Dewey v. Bowman*, 8 Cal. 145. A pledgee can sell the property only, and such sale must be for the purpose of applying the proceeds to the pay-

ment of the debt, and must be at public auction after due notice to the pledgor or owner.—*Morgan v. Dod*, 3 Colo. 551. Where no time is fixed for the redemption of a pledge, a private sale thereof, made without demand or the pledgor or notice to him of the time and place of sale, is void.—*Moffat v. Williams*, 5 Colo. App. 184, 36 Pac. 914. If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make



his margin good, and without sufficient notice of the time and place, still, if the pledgor knew of the time and place of sale and made no objection, and after the sale, approved of it and

promised to pay the balance claimed by the pledgee, he by these acts ratifies the sale. *Child v. Hugg*, 41 Cal. 519.

#### **Section 2844. Pledgor May Waive Notice of Sale:**

Notice of sale may be waived by a pledgor at any time, but is not waived by a mere waiver of demand of performance.

1887 R. S. Sec. 3421.

See *Williams v. Hahn*, 113 Cal. 475, 45 Pac. 815, in which it was held under the circumstances that the plaintiff was not required to give any notice of

the sale. The defendant had expressly waived all notice to himself and had authorized the plaintiff to sell wine at private sale.

#### **Section 2845. Positive Refusal to Perform is Waiver of Demand:**

A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged, by a positive refusal to perform after performance is due; but cannot waive it in any other manner except by contract.

1887 R. S. Sec. 3422.

**Section 2846. Sale Must be by Public Auction:** The sale by a pledgee of property pledged, must be made by public auction in the manner and upon the notice required upon sale of personal property under execution; and must be for the highest obtainable price.

1887 R. S. Sec. 3423.

Sale of personal property under execution: Code of Civil Proc. Sec. 3543 et seq.

**AUCTION SALE:** The sale by a pledgee of property pledged must be made by public auction, in the manner and upon notice to the public, usual at the place of sale in respect to auction sales of similar property, and must be

for the highest obtainable price.—*Ben-del v. Crystal Ice Co.* 82 Cal. 199, 22 Pac. 1112. The question whether a sale of mining stock made in the board of brokers is not a sale at public auction such as the pledgee is authorized to make upon default being made by the pledgor, is discussed but not decided in *Child v. Hugg*, 41 Cal. 519.

**Section 2847. Evidences of Debt Cannot be Sold; Exceptions:** A pledgee cannot sell any evidence of debt pledged to him except the obligations of governments, states, territories, counties or corporations; but he may collect the same when due.

1887 R. S. Sec. 3424.

**RIGHT OF PLEDGEE RESPECTING EVIDENCES OF DEBT:** A pledgee of mortgaged notes as collateral security, under an assignment which gives him the right, on default, to realize on the same by sale, but does not restrict him to that method, may either sell them or under this section of the Civil Code, he may realize on them by foreclosing the mortgage securing them, which, incidentally with them passed into pledge.—*McArthur v.*

*Magee*, 114 Cal. 126, 45 Pac. 1068. A creditor to whom claims are transferred as collateral security is bound to use ordinary diligence in collecting them, and is liable for loss resulting in his failure to do so; but if the transfer merely authorizes such creditor to receive the proceeds of the claims when collected, and apply them to the payment of his debt, he is not bound to prosecute their collection.—*Miller v. Gettysburg Bank*, 8 Watts, 192, 34 Am. Dec. 449 and note 451.

**Section 2848. Pledgor May Require Pledge to be Sold, When:** Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold and its proceeds to be applied to such satisfaction when due.

1887 R. S. Sec. 3425.

**Section 2849. Proceeds of Sale, Disposition of:** After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand.

1887 R. S. Sec. 3426.

Where the relation of pledgor and pledgee exists, if the debt is paid, it is the duty of the pledgee to account for

and pay over all the income, profits and advantages derived from the bailment.—Hunsaker v. Sturgis, 29 Cal. 142.

**Section 2850. Property Sold Before Debt is Due, What May be Retained:** When property pledged is sold before the claim of the pledgee is due, he may retain out of the proceeds all that can possibly become due under his claim, until it becomes due.

1887 R. S. Sec. 3427.

**Section 2851. Pledgee or Pledge Holder Cannot Purchase:** A pledgee, or pledge holder, cannot purchase the property pledged, except by direct dealing with the pledgor.

1887 R. S. Sec. 3428.

**PLEDGEE CANNOT PURCHASE:** If the property is sold by the pledgee in satisfaction of his demand, he cannot become the purchaser at his own sale.—Wright v. Ross, 36 Cal. 414. But the pledgor may consent to or ratify a purchase at public auction, by the pledgee of the property pledged.—Hill v. Finigan, 62 Cal. 426. A sufficient election by the pledgor to treat a purchase of the pledgee by the pledgor at his own sale as valid cannot after-

wards be restricted; nor can an election to disaffirm the sale be restricted or renewed at a later date for the purpose of increasing damages.—Hill v. Finigan, 77 Cal. 267, 11 Am. St. Rep. 279, 19 Pac. 494. A sale of pledged property by the pledgee to himself, not disaffirmed by the pledgor, does not affect the pledgee's relation to the property.—Hyams v. Bamberger, 10 Utah, 3, 36 Pac. 202.

Ratification of sale made by a pledgee: See Child v. Hugg, 41 Cal. 519.

**Section 2852. Pledgee May Foreclose:** Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale.

1887 R. S. Sec. 3429.

**COURTS OF EQUITY, POWER OF OVER THE PLEDGE OF NEGOTIABLE INSTRUMENT:** Under special circumstances, a court of equity has power to decree the foreclosure and

sale of a negotiable instrument in satisfaction of the debt for which it is held in pledge. Whether it has such power under ordinary circumstances: query? Donohue v. Gamble, 38 Cal. 340.

## JUDGMENT LIENS.

**Section 2853. Judgments of the United States Courts, how Made Liens:** Judgments in the district or circuit courts of the United States, if rendered in this State, may be made liens upon the real estate owned by the defendant, and also upon all real estate he may subsequently acquire, the same as if obtained in the district court of the State, by filing an attested copy of the judgments in the office of the county recorder of the county in which the real estate is situated; and no lien shall attach to the lands or other realty in any county of this State until the date of filing such transcript, except in the county wherein the judgment was rendered, in which case the lien shall attach from the date of such rendition.



1899, 5th Ses. p. 80, Sec. 1; 1891, 1st Ses. p. 119.

**AT COMMON LAW:** In the absence of statutory provision, a judgment is not a lien upon the debtor's land.—*Thompson v. Avery*, 11 Utah, 214, 39 Pac. 829.

**EXTENT OF THE LIEN:** A judgment lien attaches merely to the rights of the judgment debtor in the land and nothing more.—*Smith v. Savage*, 3 Kan. App. 556, 43 Pac. 847.

**WHEN THE LIEN ATTACHES:** Under the Montana statute, it is provided that after filing a judgment roll, the clerk should make the proper entries on the docket and that from the time a judgment is docketed, it shall become a lien, and it was held thereunder that a judgment was not a lien until docketed, regardless of when it was rendered.—*Sklower v. Abbott* (Mont.), 47 Pac. 901.

**NOT AFFECTED BY DEATH OR PRESENTATION OF CLAIM:** The lien secured on the property of a judgment debtor during his life, by docketing the judgment as provided by statute, is not affected by his death.—*Morton v. Adams*, 124 Cal. 229, 56 Pac. 1038. Moreover the presentation by the administrator of a judgment which is a lien on the property of the judgment debtor, as a claim against his estate, does not destroy the lien.—*Id.*

**MODIFICATION OF JUDGMENT:** A Washington statute provides that when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. It was held under that statute that although the record shows that a former judgment was, in form, vacated and a new one entered, yet where the new judgment is only for a small amount less than the other, and is otherwise the same, it should be treated as a modification of the former, so as to preserve liens acquired thereunder.—*Smith v. De Lanty*, 11 Wash. 386, 39 Pac. 638.

**NO LIEN ON TRUST PROPERTY:** A judgment was recorded by a plaintiff against W. and remained for some time unpaid. A year later, a deed was executed to W., granting certain land. A year after that, an execution on the judgment was levied upon the land

and a temporary injunction was granted against the execution on the ground that W. held the land in trust for his brother, who intended to use it as a homestead. The injunction was made permanent, the court holding that, while it was provided by statute that the right of an incumbrancer for value of real property shall not be prejudiced by an implied or resulting trust of which there was no notice, the judgment in this case not having been obtained and not subsisting upon the land by reason of any advantage or value rendered to the particular property in question, and the land being the homestead of the defendant, the judgment is not an "incumbrance of the real property for value;" that the land would be subjected to its judgment.—*Baird v. Williams*, 4 Okl. 173, 44 Pac. 217.

**PROPERTY PREVIOUSLY CONVEYED:** Held, under a similar statute, that its provisions do not extend the lien to property previously conveyed by the debtor to his wife by a deed valid and binding between the parties.—*Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101.

**PRIORITIES AS BETWEEN LIENS AND OTHER INTERESTS:** In Kansas, an unrecorded deed takes precedence over a judgment lien acquired after the execution and delivery of the deed and before the same was recorded, although the judgment creditor has no notice of such deed.—*Smith v. Savage*, 3 Kan. App. 566, 43 Pac. 847; but where a mortgage is given to secure an antecedent debt, it is not prior in lien to a judgment entered the same day on which the mortgage was filed, although the judgment entered was not filed until after the filing of the mortgage, but will prorate with the judgment.—*Goetzinger v. Rosenfeld*, 16 Wash. 392, 47 Pac. 882; and where a judgment has been duly docketed, it is a lien on real property previously conveyed by the judgment debtor in fraud of creditors, since the statute made the conveyance void.—*First National Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 55 Pac. 980; *Blair v. Ostrander*, 47 L. R. A. 469. See extended note to this case.

**Section 2854. Duty of Recorder:** The recorder shall, on the filing of such transcript in his office, immediately proceed to record and index the same in a separate book for that purpose, in the same manner as a judgment rendered in the court of his own county, and he shall be allowed to charge and receive the same fees as provided by the law for like service.

1899, 5th Ses. p. 80, Sec. 2; 1891, 1st Ses. p. 119.

Manner of recording and indexing judgments: Code Civil Proc. Secs. 3510, 3511.

**Section 2855. Satisfaction of Judgment, How Acknowledged:** When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing, referring to the judgment, and to have it duly acknowledged and filed in the office of the recorder of the county, in every county where the judgment is a lien. If he fails to do so within sixty days after having been requested in writing so to do, he shall forfeit to the defendant the sum of fifty dollars.

1899, 5th Ses. p. 80, Sec. 3; 1891, 1st Ses. p. 119.

**Section 2856. Judgments in State Courts:** The liens created by judgments rendered in the District, Probate and Justice courts are regulated by the Code of Civil Procedure.

New Sec. by Commission.

Lien of judgments in district court:  
Code Civil Proc. Sec. 3510, 3513.

Lien of judgment in probate and justice courts: Code Civil Proc. Secs. 3660, 3661, 3662, 3663.

**Section 2857. Lien of Seller of Real Property:** One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

1887 R. S. Sec. 3440.

**VENDOR'S IMPLIED LIEN:** "The doctrine that the vendor of real property after an absolute conveyance retains a lien for the unpaid purchase money, is well established in England, and prevails with some exceptions, in the several states of the Union. This lien is not, however, a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. It is a right founded on natural justice of allowing the vendor to pledge the property, with which he has parted, to the satisfaction of the debt which constitutes consideration of the transfer. And it is a mere equitable right and some authorities hold that it can not be asserted until the vendor has exhausted his legal remedy as against the personal estate of the vendee—(Pratt v. Van Wyck's Ex'rs, 6 Gill. & J. 495; Bottorf v. Conner, 1 Blakf. 287; Russell v. Todd, 7 Id. 239.) On the other hand, authorities of equal weight treat the lien as in the nature of a mortgage, and hold that it can be enforced without previous recourse to proceedings at law.—(Bradley v. Bosley, 1 Barb. Ch. 152; Galloway v. Hamilton's Heirs, 1 Dana, 576; Richardson v. Baker, 5 J. J. Marsh, 328; Hill v. Batte, 10 Yer. 186.) We see no objection to the suit in equity in the first instance, and many reasons for it. It will furnish a more simple and effica-

cious remedy, and in many cases, the only adequate protection against the absolute loss of the right to enforce the lien."—Field, C. J. in Sparks v. Hess, 15 Cal. 186-192. In Baum v. Grigsby, 21 Cal. 172, the same justice on page 176 says: "The lien is not a specific and absolute charge upon property. It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constitutes consideration of the transfer. It is, therefore, a personal privilege of the vendor." Nearly the same language is used in Fitzell v. Leaky, 14 Pac. 198, 72 Cal. 477, by Justice McKinstry on page 484, and he further adds: "It is the nature of a personal privilege, unassignable, which the vendor can assert, only in a suit brought for the purpose of having it decreed and enforced. The vendor has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real estate of the plaintiff." The principle upon which courts of equity proceed in establishing this lien, is, that a person who has got the estate of another ought not in conscience, as between them, keep it and not pay the full consideration money.



—*Burt v. Wilson*, 28 Cal. 632-639. It is only in cases where no security is taken, except that which the law gives, that a vendor's lien attaches to the land.—*Hawkins v. Thurman*, 1 Idaho, 598, and a vendor's lien can not be enforced for the purchase money of a contract of land, when the parties have stipulated in their contract for other security.—*Id.* There is a marked distinction between the lien of a vendor without absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase money. He can assign his contract with the conveyance of the title; and in such case, his assignee will acquire the same rights and be subject to the same liabilities as himself. In the former case, the vendor retains a mere equity which to become of any force or effect must be established by the decree of the court.—*Baum v. Grigsby*, 21 Cal. 173-177. In *Gessner v. Palmateer*, 24 Pac. 608, 26 Pac. 789, 89 Cal. 89, *Pacerson, J.* discussing this same subject says on page 92: "The various distinctions given, and principles applied to it by the courts are hopelessly irreconcilable; and if we take the expressions found in decisions and text books, without observing the distinction between the lien implied by law in favor of the vendor who has parted with his legal title and taken no security for the purchase money, and a security which the vendor has while he holds the legal title under an unexecuted contract for the conveyance of lands upon payment of the purchase money, there will probably be great confusion and inconsistency. The former, the implied lien, is properly known as a vendor's lien. The latter is improperly designated as a vendor's lien." In the same case at page 97, *McFarland, J.* says: "The vendor's lien is a mere personal, unassignable privilege, and could not be transferred to another person by a direct attempt to expressly assign the lien itself." He further says: "We have been referred to no case in this state where a vendor's lien has been held to be of any value in the hands of any person other than the vendor himself." A vendor's lien being a secret lien has not met with approval by the supreme court of the United States, though recognized by said court where established by the local laws of the different states. In *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393, Chief Justice Marshall, who delivered the opinion, says on page 51, "But whether the lien of the vendor be established as 'a natural equity' or

from analogy to the principle that in a bargain and sale, the bargainor stands seized in trust for the bargainee unless the money be paid, still it is a secret invisible trust, known only to the vendor and vendee and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate, divested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity, as well as at law. A vendor relying upon this lien, ought to reduce it to a mortgage, as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as complete owner of an estate on which he claims a secret lien." But this same court in *Chilton v. Lyons*, 67 U. S. (2 Black.), 458, 17 L. Ed. 304, says: "When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration." (In this case there had been an alienation to a bona fide purchaser.)

**WAIVER OF THE LIEN:** The filing and allowance of the claim generally against the estate of deceased purchaser for the balance of the purchaser's price of land do not constitute a waiver by the vendor of his right to a vendor's lien therefor under this section, providing that one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by personal obligation of the buyer, and in an action to establish a vendor's lien, the burden is on the purchaser to show a waiver of the lien: and so long as the debt remains unpaid, the courts will not presume that the lien has been waived, except on clear and convincing testimony.—*Selna v. Selna* (Cal.), 58 Pac. 16. Sec. 5 of the Civil Code provides that the provisions of the Civil Code so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof. Held, that the act and conduct of a vendor which indicate a waiver of the lien, may be shown by parol, since the common law character of the lien is not discharged by the Code provisions.—*Claiborne v. Castle* (Cal.), 32 Pac. 807. The vendor's lien is a simple equity, and a consideration is unnecessary to support a waiver of it.—*Id.*

**MORTGAGE:** Under the section providing that a grantor of real property shall have a vendor's lien for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer, one

who has taken a mortgage for the price of real estate can not claim a vendor's lien, even though the mortgage had no valid acknowledgment.—*Lee v. Murphy* (Cal.), 51 Pac. 549.

**Section 2858. When Transfer of Contract Waives Lien:** Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract, but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien.

1887 R. S. Sec. 3441.

**Section 2859. Extent of Vendor's Lien:** The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.

1887 R. S. Sec. 3442.

**Section 2860. Lien of Seller of Personal Property:** One who sells personal property has a specific lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price.

1887 R. S. Sec. 3443.

**NO APPLICATION TO EXECUTORY CONTRACTS:** Under an identical statute in California, it is held that this section is merely confirmatory of the common law rule, and that the lien contemplated therein exists only under a complete sale which passes title to the property, and does not attach where there is a mere executory contract of sale upon compliance with certain conditions by the party proposing to buy.—*Eads v. Kessler* (Cal.), 53 Pac. 656.

**NOT A RIGHT TO RESCIND:** The right to enforce a vendor's lien in respect of goods sold upon a credit, is

not a right to rescind a contract of sale, but is a right to detain the goods until the indebtedness for the purchase price is discharged at or before the expiration of the credit, and if not so discharged, to sell them and apply the proceeds of the sale to the liquidation of the indebtedness. It is an additional security for the payment of the purchase price, and is not waived by the act of the vendor in resorting to any other security which he may have, provided such security is not in itself a security of such a nature as waives or discharges the lien.—*Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

**Section 2861. Purchaser's Lien on Real Property:** One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

1887 R. S. Sec. 3444.

**RESCISSION BY VENDOR:** The vendor of land placed the deed in escrow under a condition that in case of the vendee's default in making payments, the sum paid should be forfeited and the deed delivered to the vendor. The vendee defaulted and the vendor obtained the deed. Held, that where the vendee recovered judgment

in an action for the purchase money paid, he was not entitled to a lien on the land under this section providing that one who buys any part of the price of the land under a contract of sale, has a special lien on it independent of possession, for such part as he may be entitled to recover back in case of failure of consideration.—*Merrill v. Merrill* (Cal.), 35 Pac. 768.

**Section 2862. Lien of Person Rendering Service on Personal Property:** Every person who, while lawfully in pos-



session of an article of personal property, renders any service to the owner thereof, by labor, or skill, employed for the protection, improvement, safe keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner for such service, and livery or boarding or feed stable proprietors and persons pasturing live stock of any kind have a lien dependent on possession for their compensation in caring for, boarding, feeding, or pasturing such live stock. If the liens as herein provided are not paid within sixty days after the work is done, service rendered, feed or pasturing supplied the person in whose favor such special lien is created may proceed to sell the property at public auction after giving ten days' public notice of the sale by advertising in some newspaper published in the county where such property is situated, or if there be no newspaper published in the county, then by posting notices of the sale in three of the most public places in the county for ten days previous to such sale. The proceeds of the sale must be applied to the discharge of the lien and costs; the remainder, if any, must be paid over to the owner.

1887 R. S. Sec. 3445, amended 1899, 5th Ses. p. 181; 1893, 2d Ses. p. 67.

**AGISTOR'S LIEN:** The section of the California Civil Code providing that livery stable keepers shall have a lien dependent upon possession for feeding horses, gives no lien to a livery stable keeper for boarding a horse placed in his charge by a person other than the owner, without the owner's knowledge or authority. — *Lowe v. Woods*, 100 Cal. 408, 34 Pac. 959. And no lien is created in favor of a livery stable keeper for the feeding of a horse left with him by one having possession under conditional sale.—*Id.* A chattel mortgage on a horse is superior to a statutory lien of a livery stable keeper for his board and keeping, furnished at the request of the owner after the execution of the mortgage.—*Sullivan v. Clifton* (N. J.), 39 Am. St. Rep. 652.

Colorado statute, giving any person who shall bestow labor upon any personal property a lien thereon, possession of the article is held to be essential to the retention of a lien as such act is mere declaratory of the common law. So, a person employed to burn brick in his employer's kilns has not such possession of the brick as to entitle him to a lien thereon for his labor.—*Wenz v. McBride*, 20 Colo. 95, 36 Pac. 1105. But a civil engineer who makes field notes, maps, charts, and drawings while employed by a corporation in and about the construction of an irrigating canal, on books and papers furnished by the corporation, is entitled to a lien on such field notes, maps, charts and drawings, and has a right to retain possession of the same until he is paid for making the same. — *Amazon Irrigating Co. v. Briesen*, 1 Kan. App. 758, 41 Pac. 1116.

**LIEN FOR LABOR:** Under the

**Section 2863. Lien of Person Making or Repairing Article of Personal Property:** A person who makes, alters, or repairs any article of personal property, at the request of the owner, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two months after the work is done, the person may proceed to sell the property at public auction, by giving ten days' public notice of the sale, by advertising in some newspaper published in the county in which the work was done, or if there be no newspaper published in the county, then by posting up notices of the sale in three of the most public places in the town where the work was done, for ten days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of

keeping and selling the property; the remainder, if any, must be paid over to the owner thereof.

1887 R. S. Sec. 3446.

Under the section of the California Code, which provides that any person who makes, alters, or repairs any article of personal property at the request of the owner, has a lien on the same for his reasonable charges, and may retain possession until the charges are paid, a person who under

contract manufactures ties for the owner of the latter's land, has a lien thereon and can recover the ties or the amount of his lien from a constable who without his consent, takes the ties on execution against the owner.—*Douglass v. McFarland* (Cal.), 28 Pac. 687.

**Section 2864. Lien of Factor:** A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal.

1887 R. S. Sec. 3447.

The factor's lien cannot attach to goods which never came into his actual possession, but were delivered or consigned by the owner directly to the purchasers, even if the factor's contract provided that the goods should be consigned to him for sale.—*Warren v. First National Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122.

**NO RIGHT TO TRANSFER:** An agent's right to a lien for commissions and expenditures on goods consigned to him for sale is personal and not transferable, and does not give his creditors any right in the property.—*Barnes Savings & L. Co. v. Bloch Brothers Tobacco Co.* 38 W. Va. 158, 22 L. R. A. 850, 18 S. E. 482.

**Section 2865. Banker's Lien:** A banker has a general lien, dependent on possession, upon all property in his hands, belonging to a customer, for the balance due to him from such customer in the course of the business.

1887 R. S. Sec. 3448.

**WHAT PROPERTY SUBJECT:** A lien may be asserted by a bank against stock for balances due by the owner for over-due checks, but such lien does not attach for paper not due at the time a transfer of stock is demanded.—*Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536. A bank has no lien upon a customer's deposit for

his indebtedness to the bank not yet due.—*Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Dec. 319. Bankers' liens upon securities in their hands must be based upon credit given upon faith of such securities, either while in possession or in expectancy.—*Russell v. Haddock* (Ill.), 3 Gilman, 233, 44 Am. Dec. 693.

**Section 2866. Mechanic's Lien:** The liens of mechanics, for materials and services upon real property, are regulated by the Code of Civil Procedure.

1887 R. S. Sec. 3449.

Mechanics' liens: Code Civ. Proc. Ch. CXXXIX.

## CHAPTER CXIV.

### NEGOTIABLE INSTRUMENTS.

#### NEGOTIABLE INSTRUMENTS IN GENERAL.

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## NEGOTIABLE INSTRUMENTS IN GENERAL.

**Section 2867. Words "or to His Order" or "to Bearer," How Construed.** An instrument otherwise negotiable in form, payable to a person named, but with the words added, "or to his order" or "to bearer," or words equivalent thereto, is in the former case payable to the written order of such person, and in the latter case payable to the bearer.

1887 R. S. Sec. 3465.

**NEGOTIABILITY IN GENERAL:** The term "negotiable," in its enlarged signification, applies to any written security which may be transferred by indorsement or delivery, so as to vest in the indorsee such legal title as will enable him to maintain action thereon in his own name.—*Odell v. Gray*, 15 Mo. 337, 55 Am. Dec. 147.

**PAYABLE TO BEARER:** A note payable to bearer does not lose its negotiable character by the indorsement of it by the payee to a third person, omitting the words, "or order," nor by indorsement in blank by the third person, preceded by a guaranty of payment and a waiver of protest.—*Halbert v. Elwood*, 1 Kan. App. 95, 41 Pac. 67.

**Section 2868. Instrument Payable to Maker, Effect of:** A negotiable instrument made payable to the order of the maker, or of a fictitious person if issued by the maker for a valid consideration, without indorsement, has the same effect against him and all other persons having notice of the facts as if payable to the bearer.

1887 R. S. Sec. 3466.

**EFFECT OF UNNECESSARY INDORSEMENT:** Where the holder of a note can pass the title to the same without indorsement, if he indorse such note, he is prima facie liable on it.—*Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56.

**TRANSFER WITHOUT INDORSEMENT:** A note made payable to the

order of the maker, and delivered by him, indorsed, is thereafter transferable by delivery, like a note payable to bearer, without further indorsement.—*Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415. Similarly, a bill drawn payable to the drawer's order, is transferable by delivery, merely.—*O'Connor v. Clarke* (Cal.), 44 Pac. 482.

**Section 2869. Instrument Payable to Fictitious Person:** A negotiable instrument, made payable to the order of a person obviously fictitious, is payable to the bearer.

1887 R. S. Sec. 3467.

**TRANSFER WITHOUT INDORSEMENT:** Where a promissory note payable "to order" is transferred without indorsement, the transferee ac-

quires only an equitable title, and can only recover subject to the defenses that were available against his assignors.—*Warren v. Stoddart* (Idaho), 59 Pac. 540.

**Section 2870. Signature is Presumed to Have Been Made for Consideration:** The signature of every drawer, acceptor and indorser of a negotiable instrument is presumed to have been made for a valuable consideration before the maturity of the instrument and in the ordinary course of business.

1887 R. S. Sec. 3468.

**CONSIDERATION:** In an action on a promissory note given for certain improvements on public lands, answer alleging that defendant was induced to

sign the note by misrepresentation of the plaintiff as to the value of the improvements and that the plaintiff was not the sole owner of the land and improvements, constitutes no defense; it



not appearing that defendant was disturbed in his enjoyment of the land or that he had surrendered or offered to surrender it to the plaintiff.—*Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339. In an action on a promissory note it appeared that plaintiff wished defendant to manage a mine which he was to purchase, and that defendant was unwilling to do so without an interest in it; that plaintiff paid for the mine and had it conveyed to them jointly and took defendant's note for half the purchase price. Held, that parol evidence of a contemporaneous agreement that defendant might examine the mine and if dissatisfied, convey his interest to the plaintiff, and the note should be cancelled, was inadmissible as varying the terms of the note. *Berry, J. dissenting.*—*Dulaney v. Burke*, 2 Idaho, 686, 23 Pac. 915. See same case, 155 U. S. 228. In an action on a promissory note by the assignee after maturity, a defendant alleged that he signed the note as surety on the principal's agreement to give a mortgage to the payee to secure the note, which fact the payee knew, and that the payee accepted the mortgage with the note, pursuant to such agreement. There was uncontroverted evidence of the truth of such allegations, and the mortgage, which showed the descrip-

tion of the land covered and the purpose to secure the note, was in evidence. The judge, sitting without a jury, refused defendant's request to find on such allegations except as to the giving of the mortgage; and also refused the request to find as to the condition and purpose of the mortgage, which plaintiff claimed was defective. Held, reversible error.—*First National Bank of Lewiston v. Williams*, 2 Idaho, 618, 23 Pac. 552. In an action against the surety on a note, the answer alleging the insanity of the maker constitutes no defense.—*Caldwell v. Ruddy*, 2 Idaho, 5, 1 Pac. 339. Evidence examined and held not sufficient to sustain charge of fraud, or that the plaintiff was not an innocent purchaser for value.—*First Nat'l Bank of Wamego, Kan. v. Skinner et al. (Idaho)*, 43 Pac. 679; *Johnson v. Linford et al. (Idaho)*, 43 Pac. 680; *Bank of Troy, Kan. v. Linford et al. (Idaho)*, 43 Pac. 680.

"VALUE RECEIVED:" The expression "value received" is not essential to the validity of a note, where no statute requires its use, as such paper, at common law, implies a consideration where none is expressed.—*Clarke v. Marlow (Mont.)*, 50 Pac. 713.

Effect of want of consideration: See 2882, this chapter.

### Section 2871. Agreement to Indorse, Signature where:

One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

1887 R. S. Sec. 3469.

INDORSEMENT BEFORE DELIVERY: The indorser of a note is not liable as a maker unless he puts his name on the back of the note before its delivery to the payee.—*Best v. Hoppie*, 3 Colo. 137; and if he does so, he is liable if there is no evidence to show his intention to become liable as indorser.—*Good v. Martin*, 2 Colo. 218. Moreover the fact that such indorser did not partake of the consideration of the note is immaterial on the question of his liability.—*Good v. Martin*, *supra*; and such an indorser becomes a maker and the liability is joint and several.—*Tabor v. Miles*, 5 Colo. App. 127, 38 Pac. 64; *Wade v. Creighton*, 25 Or. 455, 36 Pac. 289. The liability is that of a joint maker or that of a joint and several maker, according to the form of the note.—*Good v. Martin*, 95 U. S. 90.

HOW INDORSEMENT MAY BE MADE: An indorsement written with a pencil is valid.—*Brown v. Butchers' etc. Bank (N. Y.)*, 6 Hill, 433, 41 Am.

Dec. 755; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245. In spite of a section in the California Code identical with this one, a recent California case holds that an indorsement may be made upon the face of the note with the same effect as upon the back, basing this decision upon another section providing that one who writes his name on a negotiable instrument, otherwise than as maker and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement, and upon the case of *Haines v. Dubois*, 30 N. J. Law, 259, and other authorities which hold that an indorsement may be made upon the face of a note with the same effect as if made upon the back of it.—See *Shain v. Sullivan*, 106 Cal. 208, 29 Pac. 606. The liability of the indorsers of a note is not affected by the addition of the word "trustee" to his name.—*Tradesmen's National Bank v. Looney*, 99 Tenn. 278, 38 L. R. A. 837, 42 S. W. 149.

### Section 2872. When Signature May be Made on

**Separate Paper:** When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto.

1887 R. S. Sec. 3470.

**ALLONGE:** The indorsement of a negotiable note may be made on another paper attached to and made a part of the note, and called an allonge, whenever, either from necessity or convenience, such an indorsement is re-

quired.—Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720. A written assignment of a negotiable note on a separate and unattached piece of paper does not pass the legal title.—Haug v. Riley, 101 Ga. 372, 40 L. R. A. 244, 29 S. E. 44; Warren v. Stoddart (Idaho), 59 Pac. 540.

**Section 2873. Kinds of Indorsements:** An indorsement may be general or special.

1887 R. S. Sec. 3471.

**Section 2874. General Indorsement Defined:** A general indorsement is one by which no indorsee is named.

1887 R. S. Sec. 3472.

**Section 2875. Special Indorsement Defined:** A special indorsement specifies the indorsee.

1887 R. S. Sec. 3473.

**RIGHTS OF SPECIAL INDORSERS:** In an action on notes which have been specially indorsed, where the holder is an intermediate indorser,

he may strike out his own name and subsequent indorsements, so as to invest himself with the legal title.—J. D. Spreckles & Bros. Co. v. Bender, 30 Or. 577, 48 Pac. 418.

**Section 2876. General Indorsement, How Made Special:** A negotiable instrument bearing a general indorsement cannot be afterwards specially indorsed; but any lawful holder may turn a general indorsement into a special one by writing above it a direction for payment to a particular person.

1887 R. S. Sec. 3474.

**Section 2877. Special Indorsement May Destroy Negotiability:** A special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument not negotiable.

1887 R. S. Sec. 3475.

**PAYABLE TO BEARER:** A note payable to bearer does not lose its negotiable character by the indorsement of it by the payee to a third person, omitting the words, "or order," nor by

indorsement in blank by the third person, preceded by a guaranty of payment and a waiver of protest.—Halbert v. Ellwood, 1 Kan. App. 95, 11 Pac. 67.

**Section 2878. Implied Warranty of Every Indorser:** Every indorser of a negotiable instrument warrants to every subsequent holder thereof, who is not liable thereon to him:

1. That it is in all respects what it purports to be;
2. That he has a good title to it;
3. That the signatures of all prior parties are binding upon them;
4. That if the instrument is dishonored, the indorser will upon notice thereof duly given to him, or without notice, where it is excused by law, pay so much of the same as the holder paid therefor, with interest, unless exonerated under the provisions of this Chapter for failure to present the same.

1887 R. S. Sec. 3476.



**WARRANTY OF THE INSTRUMENT:** The undertaking of an indorser is conditional, that is, his promise is that he will pay, provided payment shall be demanded of the maker, and due notice of his neglect or refusal shall be given.—*Ankeny & Son v. Henry*, 1 Idaho, 229. The person receiving a note by indorsement contracts with the indorser whom he expects to hold, that he will present it to the maker at maturity for payment, and if not paid that he will give notice of non-payment without delay.—*Ankeny & Son v. Henry*, 1 Idaho, 229.

**WARRANTY OF SIGNATURES:** By virtue of such warranty, if the signa-

tures are forgeries, he is at once liable on his warranty to subsequent holder, without notice of presentment for payment or notice of non-payment.—*Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523. The indorser of a copartnership note impliedly contracts that it was made by the firm in whose name it was executed, and he cannot deny the fact when sued upon the indorsement.—*Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438. The indorser of checks warrants the genuineness of all preceding indorsements, including that of the payee.—*First National Bank v. Northwestern National Bank*, 152 Ill. 296, 26 L. R. A. 289, 38 N. E. 739.

### **Section 2879. Use of Words "Without Recourse":**

An indorser may qualify his indorsement with the words, "without recourse," or equivalent words; and upon such indorsement he is responsible only to the same extent as in the case of a transfer without indorsement.

1887 R. S. Sec. 3477.

**EFFECT:** The payee may indorse without recourse and thus transfer the legal title to a negotiable note, though he assumes no responsibility.—*Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720. Where the payee of a note indorses his name across the back thereof, opposite the words "without recourse," it is his individual indorsement and a subse-

quent indorser cannot take advantage of it.—*Doom v. Sherwin*, 20 Colo. 234, 38 Pac. 56.

**EQUIVALENT WORDS:** One is not liable as an indorser on a promissory note who places over his signature thereon, the words, "I hereby transfer my interest in the within note."—*Spencer v. Halpern*, 62 Ark. 595, 36 L. R. A. 120, 37 S. W. 711.

**Section 2880. Effect of Indorsement Without Recourse:** Except as otherwise prescribed by the last Section, an indorsement without recourse has the same effect as any other indorsement.

1887 R. S. Sec. 3478.

**Section 2881. Right of Indorsee:** An indorsee of a negotiable instrument has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance.

1887 R. S. Sec. 3479.

**RIGHTS OF INDORSERS INTER SE:** A second indorsee of a promissory note may maintain an action at law against the first indorser on an express promise to pay.—*Watson v. Hahn*, 1 Colo. 494.

**INDORSEMENT AFTER MATURITY:** An indorsee after maturity is considered as receiving dishonored paper, and takes it subject to all infirm-

ities, equities and defenses to which it was liable at the hands of the payee.—*Robinson v. Lyman*, 11 Conn. 30, 25 Am. Dec. 52; *Johnson v. Bloodgood* (N. Y.), 1 Johnson's Cases, 51, 1 Am. Dec. 93; *Weathered v. Smith*, 9 Tex. 622, 60 Am. Dec. 186. Such indorsement is equivalent to drawing a bill at sight.—*Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644.

**Section 2882. Effect of Want of Consideration:** The want of consideration for the undertaking of a maker, acceptor or indorser of a negotiable instrument, does not exonerate him from liability thereon to an indorsee in good faith for a consideration.

1887 R. S. Sec. 3480.

**CONSIDERATION:** It is no defense to an action against the indorsers on a

note, that no consideration passed from them to the maker.—*Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57.

Signature presumed to have been made for good consideration: Sec. 2870 and note, this Chap.

**BONA FIDE HOLDER:** One is not a bona fide holder of negotiable paper where he took the paper before maturity without notice of any infirmity, under an agreement to make future advances, and made the advances after notice of the infirmity in the paper.—*Benson v. Keller* (Or.), 60 Pac. 918. One of several promoters of a corporation who formed a pool to dispose of part of their private stock, with an agreement

that the proceeds of the sales should be equally divided among them, disposed of his stock through fraudulent representations, taking a note therefor which was turned over to the corporation. Held, that the latter did not become a bona fide holder.—*New Mexico Ensor Remedy Co. v. Hobson* (Idaho), 43 Pac. 573. The bona fide holder of a note procured by fraud can only recover to the extent of the amount actually paid by him for it.—*Oppenheimer v. Farmers' & Mechanics' Bank*, 97 Tenn. 19, 33 L. R. A. 767, 36 S. W. 705.

**Section 2883. Indorsee in Due Course Defined:** An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

1887 R. S. Sec. 3481.

Receipts indorsed on a promissory note and signed by the payee, do not make the holder of the note the indorsee thereof within the meaning of a

statute providing that the indorsee of a negotiable instrument, in due course, acquires an absolute title thereto.—*More v. Finger* (Cal.), 58 Pac. 322.

**Section 2884. Liability of Party to Instrument Left Blank:** One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.

1887 R. S. Sec. 3482.

**BLANKS:** The party who signs blank paper makes the holder his agent, as the blank signature operates as a general letter of credit, which authorizes the person to whom it was intrusted to fill it up as he chose.—*Davis v. Lee*, 26 Miss. 505, 59 Am. Dec. 267. A paper may be entirely blank above the signature, or in the ordinary form of a printed bill or note, with the material parts in blank, and if it be filled up consistently with the purport or tenor of the form signed or indorsed, the signer or indorser will be liable.—*Orrick v. Colston*, 7 Grat. 189; *Visher v. Webster*, 8 Cal. 112; *Ives v. Bank*, 2 Allen. 236; and yet

signing and delivering a note with a blank to be afterwards filled by the amount, gives unlimited authority to insert any sum; and in an action on such a note, a plea that the blank was, without the authority of the maker, filled with a larger amount than was intended, is not sufficient.—*Hall v. Bank of Commonwealth* (Mass.), 5 Dana, 258, 30 Am. Dec. 685; *Herbert v. Hule*, 1 Ala. 18, 34 Am. Dec. 755; but where a blank note is filled up by the payee in a manner not contemplated or authorized by the maker, it is not binding on him unless ratified.—*Bank of Limestone v. Penick* (Ky.), 2 T. B. Monroe, 98, 15 Am. Dec. 136.

**Section 2885. No Demand Necessary on Principal Debtor:** It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him, but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.

1887 R. S. Sec. 3483.

**LIABILITY OF MAKER:** The maker must suffer the consequences of the breach of his contract, in a suit there-

upon, unless he shows that he was ready to make payment thereon at the time and place mentioned in the note.—*Washington v. Planters' Bank*



(Miss.), 1 How. 230, 28 Am. Dec. 333: but if the maker prove his readiness to pay at the place named, the plaintiff takes the risk of being subjected to costs, as in the case of tender.—*Indiana & Illinois Central R. Co. v. Davis*, 20 Ind. 6, 83 Am. Dec. 303.

LIABILITY OF INDORSER: An in-

dorser for whose benefit an accommodation note was made, being bound to provide funds to meet it at maturity, is not released by lack of presentment, protest or notice.—*American National Bank v. Junk Bros. Lumber & M. Co.* 94 Tenn. 624, 28 L. R. A. 492, 30 S. W. 753.

**Section 2886. Presentment, How Made:** Presentment of a negotiable instrument for payment when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable:

First. The instrument must be presented by the holder or his agent;

Second. The instrument must be presented to the principal debtor if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person having charge of the place, or employed therein, if one can be found there;

Third. An instrument which specifies a place for its payment, must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found at the place;

Fourth. An instrument which does not specify a place for its payment, must be presented at the place of residence or business of the principal debtor, or wherever he may be found, at the option of the presenter; and,

Fifth. The instrument must be presented upon the day of its maturity, or, if it be payable on demand, it may be presented upon any day. It must be presented within reasonable hours; and if it be payable at a banking house, within the usual banking hours of the vicinity, but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day.

Sixth. If the principal debtor have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for payment is excused.

1887 R. S. Sec. 3484.

TO WHOM: The plaintiff accepted a check drawn by the defendant on a bank fifty-five miles away, and sent it direct to the bank with a request to remit the amount. The bank continued to do business one day after receiving the check, and then returned it with a statement of "No funds in bank," and did not open for business afterwards. The defendant had more than sufficient money to pay the check, on deposit in the bank. Held, that because of the plaintiff's sending the check direct to the drawee for collection, its loss was his own.—*Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067. If, however, the drawer of a check has no funds in the bank applicable to its payment, the laches of the holder in presenting it will not discharge the drawer.—*First National Bank v. Linn County National Bank*, 30 Or. 296, 47 Pac. 614. Failure to present a note with joint and several mak-

ers to each of the makers for payment, will discharge the indorsers.—*Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374.

PLACE: Where a due bill is payable in specific property at a designated place, a personal demand, at a place other than the one designated is good, unless it is met by an offer to pay at the designated place.—*Widner v. Walsh*, 3 Colo. 348. Making and dating a note at a particular place is not equivalent to making it payable there.—*Oxnard v. Varnum*, 111 Pa. St. 193, 2 Atl. 224, 56 Am. Rep. 255. The removal of the maker of a note from the place where he resided, or was represented to reside, in the note, imposes upon the holder the duty of using every reasonable endeavor to find the maker and demand payment of him, in order to charge an indorser.—*Galpin v. Hard* (S. C.), 3 McCord, 294, 15 Am. Dec. 640. The general rule that the holder of a bill or

note is not required to make personal or other demand on the maker as a condition of holding the indorser if the place of payment designated in the note or bill is closed on the day the paper falls due, is not modified or altered by the fact that a new bank is occupying the place where the bank at which the paper was made payable had formerly engaged in business.—*Hutchison v. Crutcher*, 98 Tenn. 421, 37 L. R. A. 89, 39 S. W. 724.

**BANKING HOURS:** If after banking hours, a note be presented for payment at a bank at which it is payable on the day it falls due, and the officers of the bank are in attendance, and give answer that no funds have been or are on deposit to pay it, it is sufficient demand to charge the indorsers.—*Cohea v. Hunt* (Miss.), 2 S. & M. 227, 41 Am. Dec. 589; *Commercial & Railroad Bank v. Hamer* (Miss.), 7 How. 448, 40 Am. Dec. 80; but, otherwise, if the maker had gone to the bank

prepared to pay the note and waited until the close of banking hours and had then withdrawn it.—*Salt Springs National Bank v. Burton*, 58 N. Y. 430, 17 Am. Rep. 265. A note without grace made payable in a bank, placed and remaining therein for collection until due, may be sued upon after banking hours on the evening of the day it falls due, where the opening and closing hours are well known to the maker.—*Sabin v. Burke* (Idaho), 37 Pac. 352.

**TIME:** Under California Civil Code (Sec. 10) providing that the time within which any act provided by law is to be done shall be computed by excluding the first and including the last day, a note dated September 1, payable sixty days after date, is due October 31, and in order to bind the indorser, must, in the absence of excuse, be presented on that day, as required by the fifth subdivision of this section.—*Rauer v. Broder* (Cal.), 40 Pac. 430.

### **Section 2887. Apparent Maturity of Instrument:**

The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due, or when that is a holiday, the next business day.

1887 R. S. Sec. 3485.

**DATE TO BE AGREED UPON:** A promissory note, "payable when payor and payee mutually agree," is due

within a reasonable time, if the payee will not agree.—*Page v. Cook*, 164 Mass. 116, 28 L. R. A. 759, 41 N. E. 115.

### **Section 2888. Bill of Exchange, When Presumed Dishonored:**

A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.

1887 R. S. Sec. 3486.

### **Section 2889. Apparent Maturity of Bill of Exchange Payable at Sight:**

The apparent maturity of a bill of exchange, payable at sight or on demand, is:

1. If it bears interest according to its terms, one year after its date; or,
2. If it does not bear interest according to its terms ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

1887 R. S. Sec. 3487.

### **Section 2890. Apparent Maturity of Promissory Note Payable at Sight:**

The apparent maturity of a promissory note, payable at sight, or on demand, is:

1. If it bears interest according to its terms, one year after its date; or,
2. If it does not bear interest according to its terms, six months after its date.

1887 R. S. Sec. 3488.



**INDORSER OF OVERDUE NOTES:**

An indorser of overdue notes is not liable thereon in the absence of demand on the maker within a reasonable time after the indorsement and notice of non-payment.—*Beer v. Clifton* (Cal.), 33 Pac. 204.

**AT COMMON LAW:** The common law rule is that in a case of indorsement after maturity, the demand and notice must be within a reasonable time; reasonable time depending upon the facts in each particular case.—*Beer v. Clifton*, *supra*.

**Section 2891. Promissory Note Payable Certain Time After Sight:** Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last Section.

1887 R. S. Sec. 3489.

**Section 2892. Conditions Concurrent to Payment:** A party to a negotiable instrument may require, as a condition concurrent to its payment by him.

1. That the instrument be surrendered to him unless it is lost or destroyed; or the holder has other claims upon it; or,
2. If the holder has a right to retain the instrument and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying be written thereon; or,
3. If the instrument is lost or destroyed, then that the holder give to him a bond; executed by himself and two sufficient sureties to indemnify him against any lawful claim thereon.

1887 R. S. Sec. 3490.

**LOST DRAFT:** A duplicate draft given by the drawer of one which has been lost, does not, as a matter of law, promise to pay the draft or waive a defense to liability thereon, where it was

done to accommodate the payee and enable him to collect the money from the drawee.—*Bank of Gilby v. Farnsworth*, 7 N. D. 6, 38 L. R. A. 843, 72 N. W. 901.

**Section 2893. When Instrument is Dishonored:** A negotiable instrument is dishonored when it is either not paid, or not accepted according to its tenor, on presentment for the purpose, or without presentment where that is excused.

1887 R. S. Sec. 3491.

**WHEN TO BE PROVED:** Where the gist of a cause of action against persons who failed in an attempt to incorporate as a bank, was the failure of the defendants to pay or provide for the

payment of a draft issued by them as a bank, a recovery could not be had without proof that the draft was dishonored.—*McLennan v. Anspaugh*, 2 Kan. App. 269, 41 Pac. 1063.

See also note under Section 3272.

**Section 2894. Notice of Dishonor, by Whom Given:** Notice of the dishonor of a negotiable instrument may be given:

1. By any holder thereof or his agent; or
2. By any party to the instrument who might be compelled to pay it to the holder, and who would upon taking it up, have a right to reimbursement from the party to whom the notice is given, or the agent of such party.

1887 R. S. Sec. 3492.

**Section 2895. Form of Notice of Dishonor:** A notice of dishonor may be given in any form which describes the instrument with reasonable certainty and substantially informs the party receiving it that the instrument has been dishonored.

1887 R. S. Sec. 3493.

**Section 2896. Notice of Dishonor, How Served:**

A notice of dishonor may be given:

1. By delivering it to the party to be charged, personally at any place; or
2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or
3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

1887 R. S. Sec. 3494.

When given by mail, when to be mailed: Sec. 2900.

**CERTIFICATE OF NOTARY:** Where the certificate of a notary public expressly stated that he notified the indorser of a promissory note of the non-payment of the maker, and then stated that he gave the notice by depositing a written or printed copy of it in the mail, postage prepaid, and directed to the endorser at a certain place, it was held that such certificate established a prima facie case against the indorser, and the onus was upon him to show that the place named was

not his post office address, and that the notice did not accomplish the result certified to.—*Wamsley v. Rivers*, 34 Iowa, 463. A certificate of protest by a notary, stating that service was made by leaving written notice at the indorser's "desk in the custom house, with a person in charge, he being absent," there being no specific objection that this not showing to be his place of business and no proof that no better service could be made, must be held to be prima facie, sufficient evidence of due protest.—*Bank of Commonwealth v. Mudgett*, 44 N. Y. 514; *Dakin v. Graves*, 48 N. H. 45.

**Section 2897. Notice, How Served After Indorser's Death:** In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives; or, if there are none, then to any member of his family who resided with him at his death; or, if there is none, then it must be mailed to his last place of residence as prescribed by Subdivision 3 of the last Section.

1887 R. S. Sec. 3495.

An executor named in a will, though not yet approved by the court, is a personal representative within the meaning of the section providing that notice

of protest of a note may be given in case of the death of the person otherwise entitled to notice to one of his personal representatives.—*Drexler v. McGlynn* (Cal.), 33 Pac. 773.

**Section 2898. Notice Given in Ignorance of Death:** A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

1887 R. S. Sec. 3496.

**Section 2899. Notice of Dishonor, when to be Given:** Notice of dishonor when given by the holder of an instrument or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.

1887 R. S. Sec. 3497.

**Section 2900. Notice by Mail, When to be Mailed:** When notice of dishonor is given by mail, it must be deposited in the post office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place where



the instrument was dishonored, for the place to which the notice should be sent.

1887 R. S. Sec. 3498.

**Section 2901. Notice, How Given by Agents:** When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

1887 R. S. Sec. 3499.

**Section 2902. Every Party Receiving Notice Has Like time to Give Notice:** Every party to a negotiable instrument, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.

1887 R. S. Sec. 3500.

**Section 2903. Effect of Notice of Dishonor:** A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost.

1887 R. S. Sec. 3501.

**Section 2904. Notice of Dishonor Excused When:** Notice of dishonor is excused:

1. When the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or,

2. When there is no postoffice communication between the town of the party by whom the notice should be given and the town in which the place of residence or business of the party to be charged is situated; or,

3. When the party to be charged is the same person who dishonors the instrument; or,

4. When the notice is waived by the party entitled thereto.

1887 R. S. Sec. 3502.

The insolvency of the maker is no excuse for failure to give notice of dishonor.—*Hudson Furniture Co. v. Harding* 34 U. S. App. 148, 30 L. R. A. 513. Where a bill drawn by one partnership on another partnership, is accept-

ed by the latter partnership and the two partnerships have a partner in common, notice of dishonor of a bill is not necessary to charge the drawers.—*N. Y. & Ala. Cent. Co. v. Selma Savings Bank*, 51 Ala. 305, 23 Am. Rep. 552.

**Section 2905. Presentment and Notice, When Excused:** Presentment and notice are excused as to any party to a negotiable instrument who informs the holder in writing within ten days before its maturity, that it will be dishonored.

1887 R. S. Sec. 3503.

A statement by the drawer of a bill, to the holder, that owing to the failure

of the person who was to furnish the money, the acceptor could not pay it, but that he would, not made within ten

days of maturity, is not such a statement that it would be dishonored as would excuse presentment and notice,

under this section.—*Los Angeles Nat. Bank v. Wallace (Cal.)*, 36 Pac. 197.

**Section 2906. Notice not Necessary to Indorser Holding Full Security:** If, before or after the maturity of an instrument, an indorser has received full security for the amount thereof, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused.

1887 R. S. Sec. 3504.

**Section 2907. Delay in Presentment and Notice, When Excused:** Delay in presentment, or in giving notice of dishonor, is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

1887 R. S. Sec. 3505.

**Section 2908. Waiver of Presentment Waives Notice:** A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

1887 R. S. Sec. 3506.

**Section 2909. Waiver of Protest Waives What:** A waiver of protest on any negotiable instrument other than a foreign bill of exchange waives presentment and notice.

1887 R. S. Sec. 3507.

**Section 2910. Days of Grace not Allowed:** Days of grace are not allowed upon bills of exchange or promissory notes.

1887 R. S. Sec. 3526.

#### BILLS OF EXCHANGE.

**Section 2911. Bill of Exchange Defined:** A bill of exchange is an instrument negotiable in form, by which one who is called the drawer, requests another, called the drawee, to pay a specified sum of money.

1887 R. S. Sec. 3520.

An order drawn by one person on another for lumber is not a bill of exchange and the drawer is not liable thereon.—*Scudder v. Clark*, 1 Colo. 192. The essential qualities of a bill of exchange are: 1. That it be payable at all events and not contingently or out of a particular fund. 2. That it be made for the payment of money only and not for the performance of any other act or in the alternative.—*Cook v. Satterlee*, 6 Cowen, 108, 16 Am. Dec. 432; and a bill

payable from a particular fund is nevertheless good if the fund is certain, and mention of it in the bill is merely directory to the drawee.—*Bank of Kentucky v. Sanders*, 3 A. K. Marshall, 184, 13 Am. Dec. 149. An instrument in the form of a bill of exchange and not signed by any drawer is not a bill of exchange, although accepted and indorsed, and the acceptor and indorser are not liable to action thereon by the holder.—*Tavis v. Young (Ky.)*, 1 Met. 197, 71 Am. Dec. 474.

**Section 2912. Name of Person in Addition to Drawee:** A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

1887 R. S. Sec. 3521.



**Section 2913. When Bill of Exchange to be in Three Parts:** An agreement to draw a bill of exchange, binds the drawer to execute it in three parts, if the other party to the agreement desires it.

1887 R. S. Sec. 3522.

**INDORSEMENT:** The indorsement of the first of the set of bills carries with it the second and third. Either of the set may be presented for accept-

ance, and if not accepted upon due notice, a right of action arises against the indorser.—*Welch v. Blatchley*, 6 Wis. 422, 70 Am. Dec. 469.

**Section 2914. Presentment, Etc., of Single Part of Set:** Presentment, acceptance or payment of a single part in a set of a bill of exchange, is sufficient for the whole.

1887 R. S. Sec. 3523.

**Section 2915. Bill of Exchange, Where Payable:** A bill of exchange is payable.

1. At the place where, by its terms, it is made payable; or
2. If it specify no place of payment, then at the place to which it is addressed; or
3. If it be not addressed to any place, then at the place of residence or busines of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for payment is excused, and the bill may be protested for non-payment.

1887 R. S. Sec. 3524.

**Section 2916. Rights and Obligations of Drawer:** The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument.

1887 R. S. Sec. 3525.

**Section 2917. When Bill of Exchange May be Presented:** At any time before a bill of exchange is payable, the holder may present it to the drawee for acceptance and if acceptance is refused, the bill is dishonored.

1887 R. S. Sec. 3527.

**Section 2918. Presentment of Acceptance, How Made:** Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable:

1. The bill must be presented by the holder or his agent;
2. It must be presented on a business day, and within reasonable hours;
3. It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof, or employed therein; and
4. The drawee, on such presentment, may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance.

1887 R. S. Sec. 3528.

**BILL NEED NOT BE SHOWN:** A bill of exchange need not be actually shown when presented in order that a

party on whom it is drawn may bind himself by acceptance of it.—*Fisher v. Beckwith*, 19 Vt. 31, 46 Am. Dec. 174.

**PRESENTMENT TO AGENT:** A draft binds the acceptor personally, although addressed to him and accepted

by him as agent, if it fails to disclose his principal on its face.—*Slawson v. Loring* (Mass.), 5 Allen, 340, 81 Am. Dec. 750; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 411, 58 Am. Rep. 829, 8 N. E. 583.

**Section 2919. Presentment for Acceptance to One Joint Drawer:** Presentment for acceptance to one of several joint drawees, and refusal by him, dispenses with presentment to the others.

1887 R. S. Sec. 3529.

**Section 2920. Presentment to Drawee in Case of Need:** A bill of exchange which specifies a drawee in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

1887 R. S. Sec. 3530.

**Section 2921. Presentment, When Must be Made:** When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice with ordinary diligence to forward it for acceptance, unless presentment is excused.

1887 R. S. Sec. 3531.

**LACHES:** The holder of a bill of exchange payable several days after sight drawn in New Orleans on Liverpool is not guilty of laches in not forwarding it directly for acceptance, but sending it to New York for sale.—*Bolton v.*

*Harrod* (La.), 9 Martin, 326, 13 Am. Dec. 306.

**PRESENTMENT AFTER MATURITY:** Presentment of a bill four days after maturity excludes the drawer unless excused. — *Orear v. McDonald* (Md.), 9 Gill. 350, 52 Am. Dec. 703.

**Section 2922. Acceptance, How Made:** An acceptance of a bill must be made in writing by the drawee, or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words.

1887 R. S. Sec. 3532.

**EFFECT OF ACCEPTANCE:** The contract of an acceptor is that he will pay a bill upon due presentment thereof at maturity.—*Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153. The acceptor of a draft is regarded in the same light as the maker of the promissory note is primarily liable thereon.—*Kupfer v. Bank of Galena*, 34 Ill. 328, 85 Am. Dec. 309. He is the principal debtor even though his acceptance was for the accommodation of the drawer.—*Diversy v. Moor*, 22 Ill. 330, 74 Am. Dec. 157.

**HOW MADE:** The acceptance of a bill of exchange may be made by letter whether written before or after such bill is drawn, although the holder was not induced by such letter to take the bill.—*Read v. Marsh* (Ky.), 5 B. Monroe, 8, 41 Am. Dec. 253. When one by

telegraph authorizes draft to be drawn on him and it is so drawn and discounted on the faith of the telegram, but he subsequently countermands the authority, he cannot be held as acceptor nor for breach of promise to accept.—*First National Bank of Flora v. Clark*, 61 Md. 400, 48 Am. Rep. 114. "I take notice of the above," written and signed upon an unnegotiable bill by the drawee are not words, which of themselves, necessarily import an acceptance, and parol evidence of refusal to accept by the drawee at the time of presentment is admissible.—*Cook v. Baldwin*, 120 Mass. 317, 21 Am. Rep. 517. The objection that an acceptance of a bill of exchange was not in writing as required by statute, may be urged by the drawer.—*Erickson v. Inman, Poulson & Co.* (Or.), 54 Pac. 949.

**Section 2923. Holder Entitled to Acceptance on Face of Bill:** The holder of a bill of exchange, if entitled to an acceptance



thereof, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.

1887 R. S. Sec. 3533.

**Section 2924. What Acceptance Sufficient with Consent of Holder:** The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance:

1. An acceptance written upon any part of the bill, or upon a separate paper;

2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable; or,

3. A refusal by the drawee to return the bill to the holder after presentment, in which case the bill is payable immediately without regard to its terms.

1887 R. S. Sec. 3534.

**Section 2925. Acceptance by Separate Instrument:** The acceptance of a bill of exchange, by a separate instrument, binds the acceptor to one, who, upon the faith thereof, has the bill for value or other good consideration.

1887 R. S. Sec. 3535.

**Section 2926. Promise in Writing to Accept, Sufficient as to Whom:** An unconditional promise in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person who, upon the faith thereof, has taken the bill for value or other good consideration.

1887 R. S. Sec. 3536.

**FORM OF PROMISE:** The promise need not describe the instrument by its date and the amount and the name of the drawee, as that would generally be impossible, but merely in such mode that there can be no possible doubt as to the application of the promise to the bill to be drawn.—*Nelson v. First National Bank*, 48 Ill. 36, 95 Am. Dec. 510. A letter stating that, "if we see a margin, will authorize you to draw for the cost," and a subsequent telegram on being informed of the price, "will advance cost if you buy strict good ordinary at sixteen," constitute an unconditional promise in writing to accept a bill before it is drawn, and, under the

statute, amount to an actual acceptance.—*Whilden v. Merchants' & Planters' National Bank*, 64 Ala. 1, 38 Am. Rep. 1. The liability on a written promise to pay an order of another for a certain sum is not created by the latter's indorsement on such writing, without drawing any order.—*Allen v. Leavens*, 26 Or. 164, 37 Pac. 488, 26 L. R. A. 620.

**BILL NOT YET IN ESSE:** A promise in writing to accept a bill not yet in esse will in law amount to an acceptance if the bill is taken on the faith of such promise when drawn.—*Kennedy v. Geddes* (Ala.), 8 Porter, 263, 33 Am. Dec. 289; *Steman v. Harrison*, 42 Pa. St. 49, 82 Am. Dec. 49.

**Section 2927. Acceptor May Cancel Acceptance When:** The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder and before the holder has with the consent of the acceptor transferred his title to another person who has given value for it upon the faith of such acceptance.

1887 R. S. Sec. 3537.

**Section 2928. What Acceptance Admits:** The accept-

ance of a bill of exchange admits the signature of the drawer, but it does not admit the signature of any indorsee to be genuine.

1887 R. S. Sec. 3538.

**FORGERY:** The acceptance of a bill admits the genuineness of the drawer's signature, and an acceptor who has paid a bona fide holder of a forged draft or bill, having no notice of the

forgery, cannot recover money paid, although the forgery is proved by most conclusive evidence. — *McKelroy v. Southern Bank*, 14 La. Ann. 438, 74 Am. Dec. 438; *Stout v. Benoist*, 39 Mo. 277, 90 Am. Dec. 466.

**Section 2929. When Bill May be Accepted or Paid for Honor:** On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

1887 R. S. Sec. 3539.

**Section 2930. Holder is Bound to Accept Payment for Honor:** The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

1887 R. S. Sec. 3540.

**Section 2931. Duty of Acceptor or Payor for Honor:** The acceptor or payor for honor must write a memorandum upon the bill stating therein for whose honor he accepts or pays, and must give notice to such parties with reasonable diligence of the fact of such acceptance or payment. Having done so he is entitled to reimbursement from such parties and from all parties prior to them.

1887 R. S. Sec. 3541.

**Section 2932. When Acceptor for Honor Must Pay:** A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser, after which the acceptor for honor must pay the bill.

1887 R. S. Sec. 3542.

**Section 2933. Notice of Dishonor not Excused by Acceptance for Honor:** The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

1887 R. S. Sec. 3543.

**PROTEST:** When a bill is protested for non-acceptance and afterwards taken up and paid for the honor of a

party, the holder is still bound to the same duties as to protest and notice as if the bill had not been paid.—*Lenox v. Leverett*, 10 Mass. 1, 6 Am. Dec. 97.

**Section 2934. Presentment for Payment, Where Made if not Accepted:** If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment it must be presented at the same place for payment, when presentment for payment is necessary.

1887 R. S. Sec. 3544.

**Section 2935. Accepted Payable at Particular Place, Effect:** A bill of exchange accepted payable at a particular place must be presented at that place for payment when presentment for payment is necessary, and need not be presented elsewhere.



1887 R. S. Sec. 3545.

**PLACE OF DEMAND:** If a bill of exchange is made payable at a particular place, demand must be made at that place, and must be made in order

to authorize recovery against either maker or indorser.—*Mellon v. Croghan* (La.), 3 Martin, N. S. 423, 15 Am. Dec. 163.

**Section 2936. Effect of Delay in Presentment in Certain Cases:** If a bill of exchange, payable at sight or on demand without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorser are exonerated, unless such presentment is excused.

1887 R. S. Sec. 3546.

If a bill of exchange be drawn in the state of Kentucky on persons residing in New Orleans, but no place in that city being stated on the face of the bill, it is sufficient on the date of its maturity to present it in the counting house of the drawees in that city and demand payment of their book-keeper. In such case it is not necessary it should be stated in the body of the protest that the drawees were absent at the time, as it is to be presumed in

favor of the protest, it being the act of the public officer, that there was sufficient reason of making the demand of the clerk or agent of the drawees, and at their place of business; this presumption, however, may be rebutted by other facts which show how the demand was made, if properly made, or that to make demand on the drawees personally, proper diligence was not used.—*Gardner v. Bank of Tennessee*, 1 Swan, 420; *Fox v. Rogers*, 59 Pac. 538.

**Section 2937. When Delay Does not Exonerate:** Mere delay in presenting a bill of exchange or promissory note payable with interest at sight or on demand, does not exonerate any party thereto.

1887 R. S. Sec. 3547.

**Section 2938. When Presentment for Acceptance is Excused:** The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

1887 R. S. Sec. 3548.

**Section 2939. What Circumstances Excuse Presentment:** Delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control.

1887 R. S. Sec. 3549.

**Section 2940. When Presentment Excused as to Drawer:** Presentment of a bill of exchange for acceptance or payment and notice of its dishonor are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.

1887 R. S. Sec. 3550.

The fact that the drawer had no reason to believe the drawee would accept or pay the bill before the sale of the property, excuses as to the drawer non-

presentment for acceptance or payment and notice of dishonor under this section.—*Cashman v. Harrison* (Cal.), 27 Pac. 283.

**Section 2941. Inland and Foreign Bills of Exchange Defined:** An inland bill of exchange is one drawn and payable within this State. All others are foreign.

1887 R. S. Sec. 3551.

A bill is deemed an inland bill which is dated within the state by the parties being citizens thereof, though shown by parol to have been drawn in another

state and is governed by the law of the place of its date.—*Strawbridge v. Robinson* (Ill.), 5 Gilman, 470, 50 Am. Dec. 420.

**Section 2942. Notice of Dishonor of Foreign Bill:**

Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest.

1887 R. S. Sec. 3552.

**Section 2943. Protest, by Whom Made:**

Protest must be made by a notary public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses.

1887 R. S. Sec. 3553.

**Section 2944. Protest, How Made:**

Protest must be made by an instrument in writing, giving the literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and finally, protesting against all the parties to be charged.

1887 R. S. Sec. 3554.

**Section 2945. Protest, Where Made:**

A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance and a protest for non-payment in the city or town in which it is presented for payment.

1887 R. S. Sec. 3555.

**Section 2946. Protest, When Noted:**

A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter.

1887 R. S. Sec. 3556.

**Section 2947. When Want of Protest Excused:**

The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment.

1887 R. S. Sec. 3557.

**Section 2948. Notice of Protest, How Given:**

Notice of protest must be given in the same manner as notice of dishonor, and may be given by the notary who makes the protest.

1887 R. S. Sec. 3558.

**Section 2949. Waiver of Protest; Notice of Dishonor How Given:**

If a foreign bill of exchange on its face waives protest; notice of dishonor may be given to any party thereto in like manner as of an inland bill, except that if any indorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice thereof given to him and to all subsequent indorsers.

1887 R. S. Sec. 3559.



**Section 2950. Declaration Before Payment for Honor.** One who pays a foreign bill of exchange for honor, must declare before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.

1887 R. S. Sec. 3560.

**Section 2951. Damages Allowed on Dishonor of Foreign Bills:** Damages are allowed as hereinafter prescribed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only upon bills of exchange drawn or negotiated within this State, and protested for non-acceptance or non-payment.

1887 R. S. Sec. 3561.

The language of the statute concerning the damages to be allowed upon protested bills clearly imports that it was not the intention of the legislature

to restrict such damages to bills drawn by one person or corporation on any other person or corporation elsewhere.  
—Hazard v. Cole et al. 1 Idaho, 276.

**Section 2952. Rate of Damages:** Damages are allowed under the last Section upon bills drawn upon any person:

1. If drawn upon any person in this State, two dollars upon each one hundred dollars of the principal sum specified in the bill.

2. If drawn upon any person out of this State, but in any of the states or territories west of the Rocky mountains, five dollars upon each one hundred dollars of the principal sum specified in the bill:

3. If drawn upon any person in the United States east of the Rocky mountains, ten dollars upon each hundred dollars of the principal sum specified in the bill;

4. If drawn upon any person in any place in a foreign country, fifteen dollars upon each hundred dollars of the principal sum specified in the bill.

1887 R. S. Sec. 3562.

**Section 2953. Interest Allowed Upon What:** From the time of notice of dishonor and demand of payment, lawful interest must be allowed upon the aggregate amount to the principal sum specified in the bill, and the damages mentioned in the preceding section.

1887 R. S. Sec. 3563.

**Section 2954. Damages, How Estimated:** If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange.

187 R. S. Sec. 3564.

**Section 2955. Damages, How Estimated When Expressed in Foreign Money:** If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

1887 R. S. Sec. 3565.

## CHECKS.

**Section 2956. Check Defined:** A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest.

1887 R. S. Sec. 3590.

**Section 2957. Provisions Applicable to Checks:** A check is subject to all the provisions of this Code concerning bills of exchange except that:

1. The drawer and indorsers are exonerated by delay in presentment only to the extent of the injury which they suffer thereby;

2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

1887 R. S. Sec. 3591.

The payee of a check executed by a county treasurer must bear the loss occasioned by the delay in presenting it

until the bank suspends payment.—*Greeley v. Cascade County* (Mont.), 57 Pac. 274; *Fox v. Rogers*, 59 Pac. 538.

## PROMISSORY NOTES.

**Section 258. Promissory Note Defined:** A promissory note is an instrument negotiable in form, whereby the signer promises to pay a specified sum of money.

1887 R. S. Sec. 3575.

**REQUISITES OF NOTE:** A promissory note must be a written promise for the payment of a specific sum or for a sum that can be ascertained by computation, independent of all extrinsic evidence.—*Lowe v. Bliss*, 24 Ill. 168, 76 Am. Dec. 742. And an instrument can not be a promissory note if it is not payable absolutely and without any contingency as to time or event.—*Worden v. Dodge*, 4 Denio, 159, 47 Am. Dec. 247. Accordingly, a written promise to pay a certain sum if a railroad was completed to a certain place before a fixed date is not a promissory note.—*Eldred v. Malloy*, 2 Colo. 320.

**AT COMMON LAW:** A promissory note need not be made payable in money, but by statute, it may be made payable in money, merchandise or any other thing.—*Pool v. McCrary*, 1 Ga. 319, 44 Am. Dec. 655.

**SIGNATURE:** The validity of a note made payable to the order of the maker and not indorsed by him without proper spelling of his name, is not affected by the fact that in signing the note, the letter "s" was omitted from his given name "Josiah."—*Bank of Lassen County v. Sherer*, 108 Cal. 513, 41 Pac. 415.

**DATE:** A promissory note must be certain as to the date it is payable.—*Eldred v. Malloy*, 2 Colo. 320.

**Section 2959. Certain Instrument Deemed a Promissory Note:** An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note.

1887 R. S. Sec. 3576.

**Section 2960. Bill of Exchange Becomes Promissory Note, when:** A bill of exchange, if accepted, with the consent of the owner by a person other than the drawee, or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.

1887 R. S. Sec. 3577.

**Section 2961. When Indorsers are Exonerated:** If a promissory note, payable on demand or at sight, without interest, is



not duly presented for payment within six months from its date, the indorsers thereof are exonerated unless such presentment is excused.

1887 R. S. Sec. 3578.

#### INSTRUMENTS MADE NEGOTIABLE BY INDORSEMENT.

**Section 2962. Non-Negotiable Instrument May be Transferred by Indorsement:** A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. such indorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement.

1887 R. S. Sec. 3600.

**ALL THE RIGHTS BUT NONE GREATER:** An assignee of a non-negotiable note has no greater rights

as against the maker than his assignor. —Mulligan v. Smith (Colo. App.), 57 Pac. 731. See also, note under following section.

**Section 2963. Liability of Assignor:** Every assignor, his heirs, executors, or administrators of every such instrument in writing, is liable to the action of the assignee thereof, his executors, or administrators, if such assignee has used diligence, by the institution and prosecution of a suit against the maker of such instrument, or against his heirs, executors, or administrators, for recovery of the money or property due thereon, or damages in lieu thereof; but if the institution of such suit would have been unavailing, or the maker had absconded or left, or was absent from the State when such assigned instrument became due, or absconds within twenty days thereafter, such assignee, his heirs, executors, or administrators may recover against the assignor, or his heirs, executors or administrators, as if due diligence by suit had been used. By "due diligence," shall be understood the institution of suit within sixty days after the maturity of the obligation.

1887 R. S. Sec. 3601.

**SCOPE OF THE STATUTE:** This and the next preceding section clearly refer alone to written evidences of debt

sold and transferred for value, and not to those deposited as collateral security.—Murphy v. Bartsch (Idaho), 22 Pac. 82.

## TITLE XIV.

### CHAPTER CXV.

#### NUISANCES.

##### Section.

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- 2965. Public nuisance defined.
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## PRIVATE NUISANCES.

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## GENERAL PRINCIPLES.

**Section 2964. Nuisance Defined:** Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

1887 R. S. Sec. 3620.

**OBSTRUCTIONS:** A private party or a corporation constructing a ditch or canal across a public highway or street in such a way as to render the highway or street of a town or city unsafe or inconvenient for public travel, and maintaining such a ditch without a bridge or other safe and convenient way of crossing, would be guilty of maintaining a nuisance under this section.—*City of Lewiston v. Booth* (Idaho), 34 Pac. 809. Trees on sidewalks or traveled streets, constitute per se a public nuisance.—*Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898, 51 N. W. 560. Digging into a street and tearing it up and thereby obstructing free passage, without authority, is a nuisance, within this section providing that anything which unlawfully obstructs any public street is a nuisance.—*City and County of San Francisco v. Buckman*, 116 Cal. 397, 43 Pac. 396. In an action to enjoin a nuisance, the complaint alleged that the defendant operated a mill on a river which was stocked with fish; that it placed deleterious refuse in the stream which poisoned the waters, thereby killing the fish; that such acts were a public nuisance; and that the defendant, unless restrained, would continue such wrongful acts. Held, that the complaint stated a cause of action under Sections 3479 and 3480 of

the Civil Code (identical with this section and the one following), declaring an obstruction to the free use of property by a neighborhood a public nuisance.—*People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374. The exaction of tolls by a turnpike company, after the expiration of its franchise, is a public nuisance.—*State v. Hannibal & Ralls County Gravel Road Company*, 138 Mo. 332, 36 L. R. A. 457, 39 S. W. 910. The construction of a railway in the streets of a city, without the authority of law, is a public nuisance.—*Denver & S. Ry. Co. v. Denver City Ry. Co.* 2 Colo. 673.

**INDECENT AND OFFENSIVE TO THE SENSES:** Profane language is not a common nuisance unless it is heard by citizens and the manner and occasion of the utterances are offensive and annoying.—*Commonwealth v. Lynn*, 158 Pa. 22, L. R. A. 353, 27 Atl. 843.

**HEALTH:** A pond in a city is a public nuisance, when foul and malarious exhalations arise from the stagnant water and from the sides and bed as the water is drawn off, and are intensified by the accumulations of filth, which no police vigilance can keep out of the stream, and which the dam retains and holds.—*Board of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 485, 25 N. E. 443.

**Section 2965. Public Nuisance Defined:** A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

1887 R. S. Sec. 3621.

**PUBLIC AND PRIVATE:** The difference between a public and a private nuisance does not consist in any difference in the character or nature of the thing itself, but a nuisance is pub-

lic when the danger is to the public and private when the danger is to the individual as distinguished from the public.—*Kinney v. Koopman*, 116 Ala. 310, 37 L. R. A. 497, 22 So. 593.



**Section 2966. Private Nuisance Defined:** Every nuisance not included in the definition of the last Section is private.

1887 R. S. Sec. 3622.

See notes under the two preceding sections.

**Section 2967. What is not Deemed a Nuisance:** Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

1887 R. S. Sec. 3623.

**AUTHORITY MUST BE EXPLICIT:** The legislative authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question.—*Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241, 35 N. E. 490.

**AUTHORITY UNAFFECTED BY OTHER LIABILITY:** The abutment and elevated structure of an elevated railway built under legislative authority are not a nuisance, although they may create a liability for consequential damages.—*Garrett v. Lake Roland Elevated Railway Co.* 79 Md. 277, 24 L. R. A. 396, 29 Atl. 830.

**EMINENT DOMAIN:** Under this section, a sewer, the construction of which is authorized by the Code of Civil Procedure, although a necessary evil, is not a nuisance per se; and in proceedings to condemn land for a right of way therefor, it is not necessary to show that the route proposed is least injurious to private rights.—*City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

**PERMISSION OF MUNICIPALITY:** Tanks erected in a street by the permission of the municipality, at points designated by it, to assist the owner in performing his contract of sprinkling the streets, can not be treated as a public nuisance per se.—*Savage v. Salem*, 23 Or. 381, 31 Pac. 382, 24 L. R. A. 787.

**Section 2968. Liability of Successive Owners:** Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property created by a former owner, is liable therefor in the same manner as the one who first created it.

1887 R. S. Sec. 3624.

**CONTINUATION BY TENANT:** One who purchases premises with a nuisance on them maintained by a tenant, is not answerable for the continuance of the nuisance when it does not appear that he had any control of the tenant or of the use of the premises made by him, and even if the landlord had power to enter and expel the tenant he is bound to do so for the benefit of the party injured by the nuisance.—*Lufkin v. Zane*, 157 Mass. 117, 34 Am. St. Rep. 262, 31 N. E. 757.

**NOTICE:** Repairing and preserving a railroad embankment do not make a lessee of the road liable for continuing it as a nuisance, in the absence of any notice or request from the person injured.—*Philadelphia & Reading Rail-*

*road Co. v. Smith*, 28 U. S. App. 134, 27 L. R. A. 131; but where a railroad company knowing that failure to keep open a ditch along its embankment as it existed when the company became the owner of the road, caused damage to adjoining property, is liable therefor without any express notice of the nuisance.—*Willitts v. Chicago, Burlington & Kansas City Railroad Co.*, 88 Iowa, 281, 21 L. R. A. 608, 55 N. W. 313. In an action against a grantee of land for the continuance of a nuisance erected by his grantor, notice to the defendant that the erection was a nuisance is essential to the plaintiff's cause of action, and it is not for the defendant to show the want of such notice. Such notice is not dispensed with by this section.—*Castle v. Smith* (Cal.), 36 Pac. 859.

**Section 2969. Abatement Does not Prejudice Right to Damages:** The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

1887 R. S. Sec. 3625.

#### PUBLIC NUISANCES.

**Section 2970. Lapse of Time Does not Legalize:** No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

1887 R. S. Sec. 3630.

**NO PRESCRIPTIVE RIGHT:** No lapse of time can give a prescriptive right to maintain a nuisance.—*City of Lewiston v. Booth* (Idaho), 34 Pac. 809;

*Town of Cloverdale v. Smith* (Cal.), 60 Pac. 851; *North Point Consolidated Irrigation Company v. Utah & Salt Lake Canal Company*, 16 Utah, 246, 52 Pac. 168.

### **Section 2971. Remedies Against Public Nuisance:**

The remedies against a public nuisance are:

1. Indictment;
2. A civil action; or,
3. Abatement.

1887 R. S. Sec. 3631.

This section makes no distinction as to the remedy to abate nuisances which are crimes per se and those which are not.—*Redway v. Moore* (Idaho), 29 Pac. 104. The fact that a public nuisance is

made punishable as a misdemeanor is no bar to a suit to enjoin it.—*People v. Truckee Lumber Co.* 116 Cal. 397, 48 Pac. 374.

**REMEDY BY INDICTMENT:** See Penal Code, Sec. 4764.

**Section 2972. Indictment, how Regulated:** The remedy by indictment is regulated by the Penal Code.

1887 R. S. Sec. 3632.

See Penal Code, Sec. 4764.

**Section 2973. When Private Person may Maintain Action:** A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise.

1887 R. S. Sec. 3633.

**WHAT MUST BE SHOWN:** Under the provisions of this section, a private person may have an action to abate or restrain a public nuisance, provided he alleges and shows that such nuisance is specially injurious to himself.—*Redway v. Moore* (Idaho), 29 Pac. 104; but the complaint should set forth, by positive averment, facts sufficient to show that the plaintiff has sustained special injury, different in kind from that sustained by the general public.—*Id*; *Miller v. Hare*, 43 W. Va. 647, 39 L. R. A. 491, 28 S. E. 722; *Stufflebeam v. Montgomery*, 2 Idaho, , 763, 26 Pac. 125. Then the nuisance becomes as to him a private nuisance.—*Redway v. Moore*, supra. A private action may be maintained by one who is not the sole, or even a peculiar sufferer, if his grievance is not common to the whole public, but is a common misfortune of a number or even a class of persons.—*Farmers' Co-Operative Manufacturing Co. v. Albermarle & R. R. Co.* 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43. Special or peculiar damages differing, not merely in degree, but in kind, from

those which are deemed common to all, must be suffered, in order to give a party a right of action to abate a public nuisance.—*Mahler v. Brander*, 32 Wis. 477, 31 L. R. A. 695, 66 N. W. 502.

**EXAMPLES:** One whose access to a highway is cut off by an obstruction thereof, sustains an injury in such a special sense under this section that she may maintain an action for the abatement of the nuisance.—*Helm v. McClure*, 107 Cal. 437, 47 Pac. 437; the fact that the plaintiff had constructed an embankment in front of her lot, from which she reached the street by a bridge, did not affect her right of action.—*Id*. The congregation of solicitors, hotel runners and drivers of vehicles on the street in front of a railroad station, although it may be a nuisance to the public, is not a nuisance to the railroad company if it does not interfere with the company in the discharge of its duties, although it may remotely affect the company's business by reason of annoyance to its passengers.—*Pittsburg, Fort Wayne & Chicago R. Co. v. Cheevers*, 149 Ill. 430, 24 L. R. A. 156, 37 N. E. 49.

**Section 2974. Who may Abate:** A public nuisance may be abated by any public body or officer authorized thereto by law.

1887 R. S. Sec. 3634.

**MUST BE IN FACT A NUISANCE:** Whoever abates an alleged nuisance and thus destroys or injures private property or interferes with private rights, whether he be a public officer

or a private person unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals, to protect him, it must appear that the thing abated was, in fact, a nuisance.—*Peo.*



ple v. Yonkers Board of Health, 140 N. Y. 1, 23 L. R. A. 481, 39 N. E. 320.

**PUBLIC BODY:** A municipal corporation created by the state legislature has the same right as the people

to pursue all ordinary civil remedies for enjoining a public nuisance in its streets.—City and County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396.

**Section 2975. When any Person may Abate, how Abated:** Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

1887 R. S. Sec. 3635.

**ABATEMENT:** The power to abate a nuisance does not extend to the destruction of private property used in creating such nuisance, which is sus-

ceptible of use for a lawful purpose.—Chicago v. Union Stock Yards & T. Co. 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430.

See also notes under previous section.

#### PRIVATE NUISANCES.

**Section 2976. When Notice of Abatement must be Given:** Where a private nuisance results from a mere omission of the wrong doer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it.

1887 R. S. Sec. 3642.

**Section 2977. Who may Abate; how:** A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance without committing a breach of the peace, or doing unnecessary injury.

1887 R. S. Sec. 3641.

**Section 2978. Remedies for Private Nuisances:** The remedies against a private nuisance are:

1. A civil action; or
2. Abatement.

1887 R. S. Sec. 3640.

**ONE OR SEVERAL ACTIONS:** Recovery can ordinarily be had only up to the date of the commencement of the suit, for the reason that the nuisance or trespass gives rise to a new cause of action for which successive suits may be brought.—Schlitz Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92, 32 N. E. 693. All damages for a nuisance are recoverable in one action when it is of such character that its continuance is necessarily an injury, and it is of a permanent character which will continue without change from any cause but human labor.—Hodge v. Shaw, 85 Iowa, 137, 52 N. W. 8, 39 Am. St. Rep. 290; e. g. all damages for obstructing a right of way must be recovered in one action if the obstruction consists of a permanent brick building rendering the way impassable for any purpose.—Id; so it is held that where an injury causes permanent and irremediable damage to land, recovery should be had in one action for all dam-

age, present or prospective.—Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925; 43 Am. St. Rep. 711. If the cause of an injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue it, the entire damages may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in character, but such that it may be supposed that the defendant would remove rather than suffer at once entire damages which it might inflict if permanent, then the entire damages, so as to include future damages, cannot be recovered in a single action, but actions may be maintained, from time to time, as long as the cause of the injury continues. Watts v. Norfolk & Western Ry. Co. 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521.

**OTHER CAUSES OF INJURY:** One who by maintaining a nuisance, inflicts an injury upon another is liable for the damage caused thereby, although the

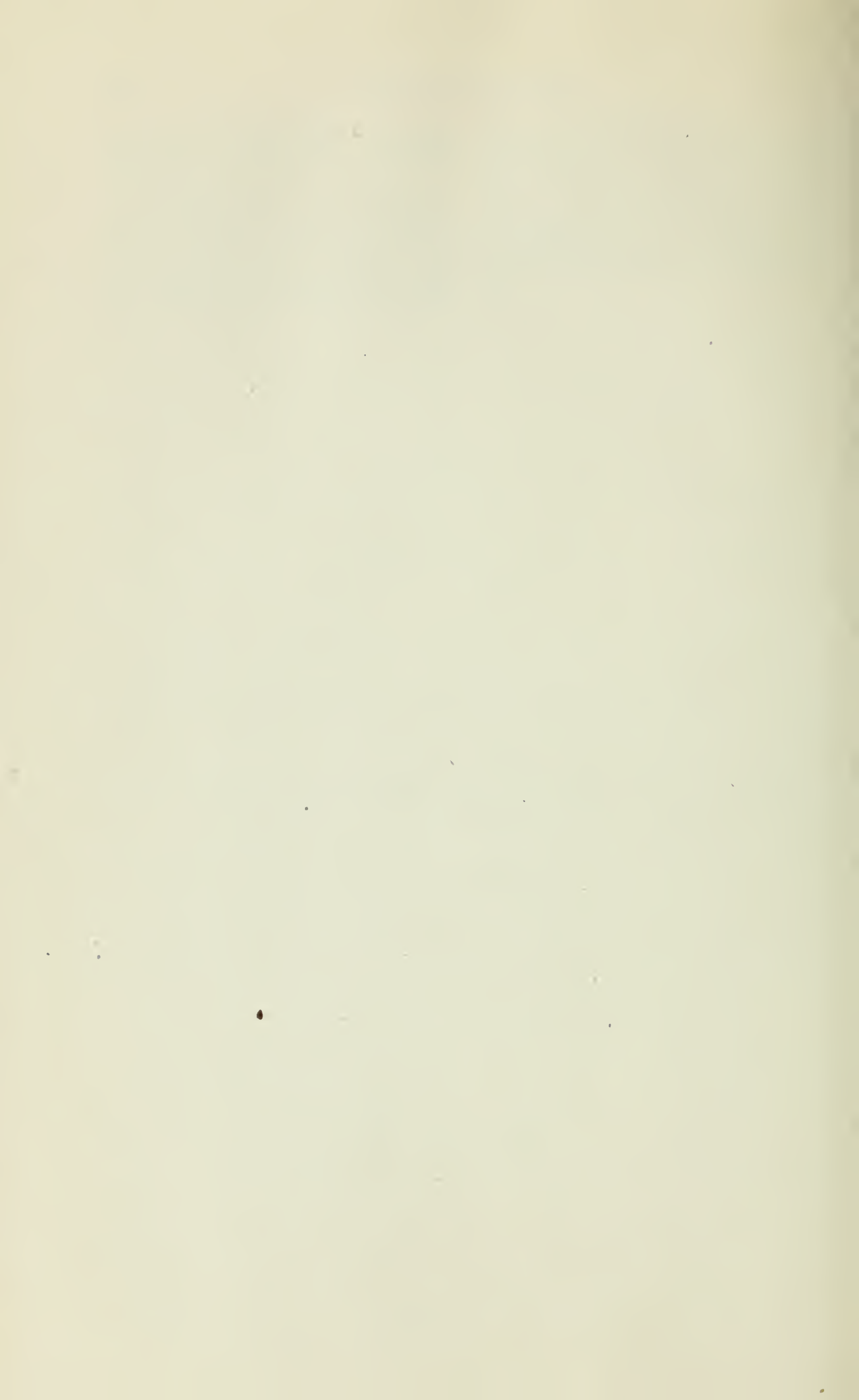
party injured has also sustained injury from other causes.—*Frost v. Berkley Phosphate Co.* 42 S. C. 402, 46 Am. St. Rep. 736, 21 S. E. 280.

**CONTRIBUTORY NEGLIGENCE.**  
The doctrine of contributory negligence does not apply to prevent a person's recovering for injury caused by a nuisance, because he has sustained other and additional damages of the same character through separate acts or

omissions of his own.—*Philadelphia & Reading R. Co. v. Smith*, 28 U. S. App. 134, 27 L. R. A. 131. In an action to recover damage for a nuisance, evidence that the injury can be avoided by doing certain acts, is admissible in mitigation of damages, but is no defense to the action.—*Beatrice Gas. Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 711, 59 N. W. 925.









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